CRI/T/5/87

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v

NOSI MOTHIBETSANE

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 3rd day of December, 1990

The accused is charged with the murder of Seetseng Makume who died from assault injuries on 23rd November 1985. The scene of the assault was at a place called Ha Ramatlepe in the Mafeteng District.

The accused pleaded not guilty to the charge. Originally the accused was one of the four assailants who were charged with this offence. Some or all of his other co-assailants have since been tried. The accused's trial to-day is a result of an application for separation of trials necessitated by the accused's failure to stand trial with the alleged co-assailants.

The depositions of P.W.4 Gerard Mpela at the Preparatory Examination were admitted because this witness has since died and consequently could not give oral evidence in this Court.

The Post-Mortem Report of the Medical Officer who examined the deceased's body was also admitted because that officer Dr. Westenhuis has since completed his contract with the Lesotho Government and gone abroad for good.

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The defence on its part made formal admissions of the witnesses whose P.E. depositions were accepted by the Crown and thereupon read into the recording machine and thus made part of today's proceedings. The witnesses in question are the following :-

P.W.3 Mohanoe Sello
P.W.5 Setlai Leferefere
P.W.9 Mahusetsa Makume
P.W.10 'MatSolo Lefama
P.W.12 D/Trooper Moshoeshoe

Although the defence was prepared to admit the evidence of P.W.6 Seabata Shano the Crown did not accept that admission. Consequently the witness was called upon to give oral evidence and in turn cross-examined on it.

The evidence led indicated that the deceased was a miner in the goldfields of South Africa and had not been long in the village because he had had a week-end off from his job.

On the day of the incident the deceased was present at a stockfair party held at the home of P.W.8 'Masupang. Many people had gathered there. Beer was being sold at this party which had started approximately at 9.00 a.m.

The deceased was in a jolly mood and displaying a very generous disposition.

The accused and P.W.5 had brought their tape recorders to this party. P.W.5 was operating one of these recorders to provide music. The 3 other co-assailants were not present when P.W.6 came at about 3.40 p.m. to this party. True to his generosity the deceased bought 40 cents worth of beer and offered it to P.W.6 and one Thabang who drank it. The accused does not drink.

The accused went out carrying his tape recorder and left the scene.

Because the batteries of the recorder which had remained in play had run down the music stopped and the deceased stopped dancing. The deceased had his knobkerrie with him at this feast. He bought a four gallon tin full of beer for all those who were there. He paid some R6-00 to P.W.8 for the purchase of this beer.

The merrymakers took the 4-gallon tin outside and lavishly helped themselves to its contents.

When he left the accused did not say where he was going. However one and half hours later his presence at the scene was noticed by P.W.8. She did not notice when the accused came back though.

For purposes of clarity the three original accused Ramanaka Mothibetsane, Mphonyane Leferefere and Maqhobela Petlane will be referred to as co-assailants 1, 2 and 4 in these proceedings respectively.

Co-assailant 4 arrived, found the deceased holding a mug full of beer. The deceased offered co-assailant 4 this beer which happened to be the very last drop from the 4-gallon tin which those present had been treated to. Co-assailant 4 gulped it hurriedly with the result that some of the beer spilled on his chin and chest.

The deceased was later seen standing at one of the corners of P.W.8's house, heartily engaged in a conversation with P.W.6. While thus engaged in this conversation with the deceased P.W.6 observed the accused repeatedly hitting the ground with his stick. P.W.6 apparently thought nothing of this and dismissed it as some form of an innocuous but strange diversion.

The accused seemed to have approached the scene from the left while the 3 other co-assailants approached it from the right. Even as the deceased was looking away from P.W.6, co-assailant 1 came between the deceased and P.W.6,

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and levelled his stick at the back of the deceased's head with the result that the deceased who was caught unawares by this blow staggered forward and towards the left in a haze only to be dealt a savage blow on the chest with a timber stick by the accused who explained that he feared or thought that the deceased was fighting his brother assailant 1.

At this stage in the chain of events it is important to note that the accused conceded that he was aware when the deceased received the blow from the back of his head that the deceased was taken unawares. He was aware also that the deceased in his staggering flight from the blow he was not posing any danger to anybody. Thus caught in the jaws of this untenable behaviour on his part in attacking the deceased who was flailing his limbs in a haze the accused sought to explain his behaviour by saying that all turned blurred in his mind and without knowing what he was doing he found himself having struck the deceased on the chest with that stick.

It is important also to note that P.W.11 D/trooper Lephoto had in his evidence in the presence of the accused in this Court stated that the accused had told him that he fought the deceased because the latter had fought his brother co-assailant 1. Asked therefore how the accused could reconcile the statement he is said to have given to P.W.11 with his evidence that he assaulted the deceased because he thought the latter was fighting his brother, the accused said he did not hear when P.W.11 gave this piece of his testimony. The upshot of the accused's failure to hear evidence given in his presence which evidence conflicts with his own is that this adverse evidence remains unchallenged. Furthermore the accused was represented in these proceedings. If it is true that he did not hear this evidence which contradicts his, I am in no doubt that the accused's counsel would have cross-examined P.W.11 on it provided he was of the view that it was not true.

Needless to say the accused in his own words con-

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that his version that the deceased could be said to have attacked a man away from whom he was facing when assaulted was nonsensical.

Further evidence shows that after the initial blow to the back of his head the deceased who was set to by the accused and his co-assailants fell to the ground. Crown witnesses testified that while on the ground the deceased was belaboured by these men with sticks in a manner akin to thrashing of sorghum.

It is on record that the accused's timber stick got splintered in the process whereupon he picked up the deceased's knobkerrie from where it had fallen and belaboured him some more with it.

The accused states that he hit the deceased with that knobkerrie only once on the arm. Asked why;he said because he thought the deceased would rise and attack him and the others who had joined in the assault on the deceased who was already sprawled helplessly and in careless abandon on the ground. In this posture of events when asked if he seriously thought the deceased could rise and pose any danger to the four men assaulting him the accused retreated to his well-worn excuse that his mind had gone blurred and consequently he just saw himself doing what he did.

Albeit with some reluctance the accused conceded that his position at the time of the assaults while the deceased was lying prostrate was towards the upper part of the deceased's body.

Evidence showed that when seen in the deceased's hands his knobkerrie was still intact and the handle long. However, after the assault on the deceased with that knobkerrie the handle was now shorter showing that it had got broken. The accused says he does not remember in what condition that knobkerrie was when he picked it up and hit the deceased with it. He however conceded that had the

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knobkerrie been used prior to the attack on the deceased he would have noticed if he was present when that knobkerrie was used. In the light of the fact that prior to the attack on the deceased no commotion occurred necessitating the use of that knobkerrie it is safe to infer that the knobkerrie's handle got broken when applied by the accused on the deceased. It is also safe to infer that much force was used in wielding that knobkerrie with the result that it broke. Needless to say that from reliable evidence showing the accused's place vis-a-vis the position of the deceased's body during the assault the accused must have hit the deceased on the upper body.

Reliable evidence shows that the accused did not only hit the deceased once with that knobkerrie. It also shows that he did not hit him only once with that stick. Surely it becomes difficult to understand how, if it is true that the accused's mind went blurred after using each of these weapons only once to hit the deceased, he could recollect with clarity of mind that he had applied either of them only once unless the beclouding of his mind was conveniently selective; that is completely beclouded to make him unaware of what he was doing but at once sufficiently clear to enable him to state with certainty that on each occasion he hit the deceased once. To my mind the accused's account of his participation in the assault is untenable and geared at either minimising his participation or falsely denying the savage attack he unleashed on a man who posed no danger to him.

The Crown submitted that the accused's departure to 'Mapokane's from where he came to the scene almost simultaneously with the 3 co-assailants was a mere ruse embarked on by him after he had ascertained that the deceased was at P.W.8's place so that the co-assailants and he could later come and kill the deceased as they did. The accused denies this. He however is at a quandary to say how a man who appeared to pose no danger to anyone, who was offering almost everyone who was at the stockfair beer he had bought, could for no apparent reason be so savagely attacked unawares even by a

of the co-assailants who drank the last drop of beer bought by the deceased. The accused is unable to say why in the light of his admission that his explanation is absurd he participated in the assault on the deceased.

It is not difficult therefore to draw a conclusion that the attack on the deceased was not sponteneous but a result of premeditation by those who unleashed this savage and brisk attack on him.

The accused conceded that the deceased was older than he is and that the deceased at one stage grew up in the accused's parental home. He conceded further that he in turn went and stayed at the home of the deceased as the deceased's ward after the deceased got married and set up a home nearby in their village.

It would seem to me therefore that in order to negative the view that the accused's sole departure from P.W.8's place was in order to fetch the co-assailants, he used a stratagem of separating from the co-assailants and approaching P.W.8's place by taking a round about path. The purpose of this stratagem was to hoodwink those who had remained on the scene into believing that the accused played no part in the plot that was hatched against the deceased previously.

To my mind the simultaneous arrival of the accused and the co-assailants at P.W.8's place after the accused's long disappearance from that place was no coincidence, less still his assault on the deceased immediately after co-assailant 1 had dealt the deceased a stunning blow at the back of his head.

A matter of further significance is that the accused, after the deceased had been beaten to death and any prior attempts by P.W.6 and P.W.8 to intervene on the deceased's behalf had been thwarted, lingered for a short while when his companions departed and blew his whistle.

P.W.8 and P.W.6 said the whistle was blown as a mark of triumph for the mission successfully accomplished. The accused does not deny having blown the whistle immediately after the deceased appeared to be dead. He however says that that did not signify any triumph on his and his companions' part. He says that he blew his whistle to summon those who were to accompany him to the circumcision school. P.W.6 in a very fair and generous manner told the Court that indeed a whistle can be blown either to summon people to go to the circumcision school or as a mark of victory, triumph or celebration.

The accused stated that he failed to go to the circumcision school or be accompanied to that place by those he was summoning there because it was decided by the co-assailants that they go to the chief's place because they had caused an accident at P.W.8's place.

It thus poses no difficulty to rule out as a mere red herring across the trail the accused's attempt at watering down the obvious triumph signified by his blowing the whistle immediately after the assault. He attempts to water down this celebration by inventing a wholly unrelated story that he blew the whistle to summon people to a circumcision school. The accused's version lacks local colour in the extreme in this regard.

Confronted with the incongruity of his version of the circumcision school in comparison with the one borne out by circumstances as the more relevant, the accused grunted his disagreement but bore the look of a dying duck in a thunderstorm.

The authority of S. vs X 1974(1) SA 344 at 347 H to 348 A is relevant as to the state of an accused's mind as reflected by acts done after the crime. This authority is even more so in the instant matter where the accused's state of mind was marked by fanfare and joy immediately after the offence.

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The Court has to also have regard to the fact that the accused breached his conditions of bail by failing to attend his trial at the time the co-assailants were tried. There is authority for the view that a man who flees from trial confirms his guilt.

The post-mortem report shows that death was due to brain damage. The skull was fractured and there was a depression on it.

Regard being had to the fact that the accused was standing opposite the deceased's upper body when the assaults were carried out, and that his stick and the deceased's knobkerrie applied by the accused splintered and broke respectively leaves me in no doubt that the force with which these weapons were used was savage and directed at the upper part of the deceased's body of which the head is a vital organ.

Miss Moruthane for the Crown submitted that when P.W.2 knocked off from work and came to P.W.8's stockfair the accused was still absent. She submitted that it was no matter of sheer coincidence that when the accused came back to the scene his brother and other co-assailants including the accused converged on the deceased.

She further submitted that there was actual intention to kill on the part of the accused formulated earlier than at the time the attack was launched. She buttressed her argument by stating that all the assailants including the accused encompassed the deceased's death. On this basis she prayed that the accused should be found guilty of the murder of the deceased on the basis of a manifest intent called dolus directus as distinct from dolus eventualis.

Arguing in the alternative and relying on S. vs Ngobozi 1972(3) SA 476 at 478 Miss Moruthane prayed that the accused should be found guilty of murder on the basis of the principle of common purpose. She quoted a passage

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referred to in the above case saying -

> "Suppose A and B, each carrying a knife, form an unlawful common purpose, in the execution whereof each is to play a contributory part, to assault C by stabbing him. In the ensuing scuffle, first A gets in the fist and only stabbing-blow; and as the result C falls dead.
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> Each is guilty of murder if he subjectively foresaw the possibility of the execution of their unlawful common purpose causing the death of C. In other words, each unlawfully and negligently caused the death of a fellow being".

Needless to say common purpose can arise on the spur of the moment and without prior deliberation or formulation of method of attack.

Relying on Rex vs Cilliers 1937 AD 278 at 285 the Crown pointed out that acts or utterances of one conspirator are admissible against the other if made in furtherance of the common purpose.

Having considered the evidence adduced in this proceeding and considered the authorities highlighting and supporting the legal principles to be had regard to I find that it would not be necessary to resolve the present case on the basis of common purpose in the teeth of abundant evidence showing that it would not be wrong to infer that the intent to kill was formed long before the attack was launched on the deceased.

Consequently the accused is found guilty of murder with direct intent.

My assessor agrees.

J U D G E

3rd December, 1990

JUDGMENT ON EXTENUATION

Defence Counsel having started off to give an ex-parte statement not based on sworn evidence was invited by the Court to say if he had had regard to the words of Schutz P. as he then was in C. of A. (CRI) No. 7 of 1989 Naro Lefaso vs Rex (unreported) at 12.

The main thrust of that judgment on extenuation is that where counsel wishes to rely on a statement of the nature referred to above he or she should "ascertain clearly whether the Crown admits its factual correctness".

In the instant case it appeared that learned Counsel for the defence had not paid any regard to this state of affairs.

Having utilised the time allowed him to acquaint himself with relevant portions of that judgment and to consult further with the accused he very properly decided to lead the accused in evidence on extenuation.

The main thrust of the accused's evidence at this stage was that in September 1985 the deceased in the company of his wife came knocking at the accused's place at night while the accused was sleeping there alone.

The deceased accused him of having an illicit love affair with his wife. The deceased hurled an insult at him to wit "your mother's vagina" and left the accused in there with a promise or threat that he was going to report his complaint to the accused's mother.

The accused rose after the deceased had left, dressed up and fled to Rasekonti's place because he said he feared the deceased would come back and kill him.

The accused reported to Rasekonti what had transpired between him and the deceased. The following day Rasekonti undertook to confront the accused with the

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deceased but was dissuaded from letting the accused accompany him by one Dyke. Thereupon Rasekonti went alone to see the deceased for the deceased would kill the accused.

It is to be wondered how the deceased could have done this at any subsequent time having let slip the opportunity to kill the accused when he found him undressed at night at the accused's place where the latter had just awoken from his sleep. Be it remembered that the accused says the deceased even then was armed with a knobkerrie.

When Rasekonti came back to report about the results of his trip the accused's mother was with Dyke and the accused. He told them that the deceased had said that this be kept a secret confined to only those who had, up to this far, heard it.

The accused's mother became suspicious and went to complain to the chief about his child being threatened at night by the deceased. The chief did not call the deceased to confront him with the accused's mother. Afterwards when he gave this matter a more serious attention the deceased was already gone to the mines. Thus the chief's efforts were thwarted.

Then Ramanaka the accused's elder brother came back from the mines a week before the events whereupon the accused told him of the foregoing. Ramanaka expressed a wish to see the deceased wherever opportunity would allow.

On the day of the incident the accused having located the deceased at P.W.8's place left and went to 'Mapokane's to alert Ramanaka and the other co-assailants of the deceased's presence at P.W.8's.

The accused and they duly set out for P.W.8's place. The accused separated from them some distance away from that place and took another path leading to P.W.8's place.

This is the place where this dastardly and wanton attack on the deceased took place.

The accused laid much store by the fact that his brother, despite the accused's dissuasion, insisted that the deceased should be confronted there and then. The accused says he had advised that this matter would better be looked into at home and not at the stockfair. However, he was prevailed upon by his brother whom he feared would, if the accused persisted in his advice, charge the accused with lying if he seemed to be wavering instead of seizing this opportunity to go and confront the deceased there and then.

The accused said that on his own he feared the deceased so much that he would not have dared challenge him to a fight. He accordingly wants the Court to believe that his brother Ramanaka is the one who influenced him to commit this offence.

The accused was hard put to it to say why he did not tell this story to the Court in the main trial. His excuse is that he had forgotten. He only came to remember it when his Counsel urged him without let up to remember it. The Court is not oblivious of the fact that the accused was, during the main trial, pressed without avail to say why the deceased was killed. It cannot be true therefore to say he had forgotten the reason why. He conceded that the reason he has now advanced was important. It is therefore my view that he was lying when he said he had forgotten it. He was also lying in the main trial when he said he did not know why his brother and he assaulted the deceased.

In the light of the fact that he has now brought to surface some background to this entire episode it becomes clear again that, despite his assertion to the contrary, he is lying when he persists that the plot to kill or assault the deceased was not embarked upon at the time he alerted

the co-assailants of the deceased's presence at P.W.8's place; or even earlier.

While his cohorts might have had beer to drink the accused was in his sober senses. This in itself can scarcely accommodate him within what the law regards as extenuating circumstances. These being factors not too remotely related to the offence but if shown to exist, serving to reduce the offender's moral blameworthiness. Needless to say in order to avail extenuating circumstances must be established by the accused on a balance of probabilities.

I have strained my wits to consider what possible extenuating circumstances can be said to exist where an innocent man struck unawares from the back of his head is converged upon by a group of four mature men each armed with either timber sticks, knobkerrie or sword, and is belaboured in a manner similar to thrashing of sorghum.

Serious consideration of the excuse advanced that the accused's brother prevailed upon him to commit this cowardly and nefarious act has brought me to the view that it would be perhaps flying in the face of moral loyalty to one's brother and would even have constituted a course of conduct that would have taxed the emotional resources of a much more sophisticated individual than the accused's if he did not give in to his brother's wicked schemes.

For this I do find that extenuating circumstances just and only just exist in this case.

You may count yourself extremely lucky for this finding.

My assessor agrees.

The accused is sentenced to 20 years' imprisonment.

J U D G E

4th December, 1990

For Crown : Miss Moruthane

For Defence: Mr. Fosa