CRI/T/36/90

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v

DAMANE DAMANE

HELD AT QUTHING

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla on the 10th day of December, 1990

The accused was charged with the murder of one Tsokolo Masoetsa who died on the 11th September, 1989 at Makhalong Mphaki in the district of Quthing. The accused pleaded not guilty to the charge. It was admitted on behalf of the accused the preparatory depositions of the following witnesses :

P.W.6 - Dr. Sfetcher Klauss
P.W.7 - D/Tpr Ntepe
P.W.8 - W/O Hantsi

The first Crown witness who was called and gave oral evidence is one Boy-Boy Letsie who lives at Mphaki in the same area as the accused does. He knew both the accused and the deceased. By profession he is a builder having got himself a certificate in that regard. On the 11th of September 1989, he told me that he was at Mphaki working

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there. After knocking off, he repaired to Makhalong which is his home, this was around 3 or 4 o'clock p.m. He was in the company of Tlali P.W.5 and one Malefetsane. Along their way they were met by the deceased who was riding on horseback and his horse is said to have been moving slowly. Shortly afterwards they met with the accused who was also on horseback following the deceased. After they had gone past the accused they were just about to meet a lady who was moving in the opposite direction to them, thus following the deceased and the accused. She drew their attention to people who, she said, were fighting behind them. The trio hurriedly went to the scene. Indeed, according to one of these Crown witnesses, when their attention was brought to this incident, I was told, the trio were about from where the witness-box is to the building outside there estimated at about 20 paces.

P.W.1 corroborated by P.W.3 told me that they saw the accused grappling with the deceased. And then, their grappling led to a fall into a culvert. The accused was seen, repeatedly, using Exhibit 2, the stone, to hit the deceased. The deceased tried to rise but failed. The trio tried to intervene, orally, by asking the accused to leave the deceased be. The accused's benign answer was in the form of a question asking if they hadn't any business to do. At the time the accused was seen carrying the stick which is before Court and he was seen moving from where he had been belabouring the deceased with this stone going to the rise in the road and picking a stone, the size of a cement block, raising or lifting it and then letting it drop on the head of the deceased.

The accused is said to have said when leaving the deceased that the deceased had stabbed him with a spear but did not kill him, and that this is now the chance that the accused was going to use for killing him. He was heard to ask boys who were around there if the deceased hadn't died. And he took the deceased's horse and mounted it and left

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the place chasing his own horse while he was mounted on the deceased's horse.

The accused denies, this is what he says, that when he was seen by these witnesses he was riding on his own horse; he denies also that he used a big stone to drop on the deceased's head while the deceased was lying prostrate.

In evidence before me, he told me that the deceased had way-laid him and that the deceased was armed with a stirrup and a whip. The deceased is the one who started the fight.

At the time when the accused was applying for bail a short while after the events, he told the Court then that the deceased was armed with a stick, but today some year and odd weeks afterwards he suddenly remembers that the deceased was armed with a stirrup and a whip.

Needless to say I have observed the witnesses who gave evidence for the Crown on the issue. They were not only consistent in what they said, but their story had a ring of the truth to it. Moreso because they consistently, with the exception of the deceased's brother told me that they had nothing against the accused, therefore, they would have had no cause whatsoever to give evidence falsely incriminating the accused. It is in this respect, therefore, that I accept their evidence that the accused was seen riding on horseback hurriedly behind the deceased. Even with regard to the deceased's brother, he told me that even though there is no love-lost between him and the accused, he wouldn't falsely implicate him in this Court. I take his story as true also on that, moreso because his story was not tested or challenged when he said the accused during one of the occasions when they had differences with the deceased went to the deceased's place - and in the words of the deceased's brother "besieged the deceased along with the deceased's children" - according to the deceased's brother's story.

Needless to say, this story was never tested or

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challenged, therefore, it is taken as evidence before Court which is truthful.

It would appear, therefore, from that evidence that the accused has consistently been the aggressor whenever he had occasion to encounter the deceased. Because not only did the deceased's brother give evidence to that effect but there was also one of the Crown witnesses, a mature man, who told me that the accused had one time insulted his mother and that the mother complained to the deceased and asked him to chastise the accused way back when the accused was in his early twenties. The deceased obliged and chastised the accused. This sort of gives a background to the feud, the long feud that existed between the accused and the deceased. But the peculiar aspect of this feud is that whenever it came to either blows or whatever, it was always the accused who was seen either around the deceased's place or because the accused was being reprimanded legitimately by the deceased at the accused's parents' request.

I have no hesitation then in rejecting the accused's story as just a fabrication and as not worthy of credit at all. Of course, as put by his counsel in summarising the case for his client, an accused person has the lattitude while fighting for his life to tell lies but some of the lies he gave were so ridiculous that they could best be looked upon with contempt.

The injuries have been described by the doctor who performed the post-mortem. The doctor ascribed death to multiple skull fractures which also led to bleeding into the brains and causing tremendous compression in there. The doctor described the use of force applied there as tremendous to get such a fracture that he found. I have no doubt in my mind that the stone that the witnesses described and said they saw the acused lift and let drop on the deceased's head could have caused the injuries that the doctor has described.

The accused's story consists of inconsistencies. He told me in his evidence - in-chief, that after he had hit the deceased twice with Exhibit 1 he had occasion to move on to the top of the road and left him there. This is the evidence that he gave in his evidence -in-chief. Ten minutes afterwards he told me that he hit the deceased five times on the same spot with that Exhibit 1. Asked how he would reconcile the story that he gave me about hitting the deceased twice with this stone, with the statement he made later that he hit him five times, he was obviously in a cleft stick. And the reason is very obvious, namely that the five to make the number of occasions that he hit the deceased with that stone to rise to five he would have had to resile from his story that after hitting the deceased with this stone twice he left for good. In other words, in order for the number of occasions in which he hit the deceased with that stone, even if it was at the same spot, to come to five he would have had to go back to the scene after returning from the place where he had left for good after hitting the deceased twice with that stone. One sees in that type of relation of a tale or narration of a story a desperate move to run away from the obvious. I have no doubt that the Crown witnesses tell me the truth when they say that the accused picked up this enormous stone and let it land on the deceased's head. The accused wants to make merit of the fact that the stone in question has not been brought in Court. While in fact that is a charge on the investigating officers, it does not assail the credibility of the Crown witnesses who testified to this point before me.

The question then to ask in this case is why should the accused have belaboured the deceased the way it is described he did; and ultimately kill him? One of the factors that a Court has to take into account is an accused's behaviour immediately after the event. S. vs X. 1974(1) SA 344 at 347 H to 348 A is authority for the view that the accused's conduct immediately after the event is

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pertinent to the charge or the state of mind in which he was when he committed the offonce. The Crown witnesses told me that the accused asked if the deceased hadn't yet died. That clearly shows the intention that he meant the deceased to die when he assaulted him.

The Crown in argument submitted before Court that on account of the long feud that existed between the deceased and the accused the latter must have formed an intention to settle old scores with the deceased. The defence asked the Court to reject that as having no basis whatsoever in evidence. But where there is no direct evidence it would help to use inferences to arrive at a conclusion provided that the inference sought to be drawn is the only one that is reasonable in the circumstances.

It would appear in the circumstances therefore that the existence of the long feud between the accused and the deceased could very easily lead to the accused behaving in the way he did towards the deceased. But if that be not the case, surely, this behaviour immediately after the encounter shows that he had the intention to kill. I reject, therefore, the version that there was any case for self-defence in this trial. I also reject the accused's story that the deceased had way-laid him. First of all the Crown witnesses said that the deceased was not armed with anything. Naturally, a man who seeks to way-lay another usually makes preparations to ensure that his life would never be in danger. There was no how the deceased could arm himself with a stirrup and its strap while intending to way-lay the accused if at all he used the stirrup and strap. That only shows the desperate attempt on the deceased's part to quell whatever attack was being mounted against him if at all he used the stirrup and its strap. In any case the accused said just as much,namely, that if he himself were to be attacked then he would use the stirrup as the last resort. The only inference to draw from the accused's denial that he was riding on horseback when he came following the deceased is that the accused does

not relish the idea that he was eager to catch up with the deceased who was riding ahead of him, and pick up a quarrel or a fight with him. He chose to tell this deliberate lie in the teeth of overwhelming and credible evidence with the hope that, because he would not ordinarily catch up with the horse rider i.e. the deceased if he was walking on foot, some impetus could be given to his story that he was able to catch up with the horse-rider not because he had come hurriedly following him but because the horse-rider had motionlessly way laid him.

The accused collected some items from the scene including the deceased's blanket and the horse. It is to be wondered why then if the deceased in this encounter had occasion to use his whip the accused didn't collect the whip to report himself carrying it along with him as he did to the police. I have already stated that the question of the use of the stirrup and the whip are just figments of the accused's imagination. He would have indeed made mention of them at the time that he was under oath while applying for bail before Court if they featured at all in this trial. But in the evidence he made mention of a stick. No stick was brought to Court belonging to the deceased. It would appear that even before the Court that heard his bail application the accused was telling lies.

The accused is accordingly found guilty of murder as charged.

My assessors agree.

J U D G E

10th December, 1990

EXTENUATING CIRCUMSTANCES

I have just heard an address on the existence or otherwise of extenuating circumstances in this case. Of their nature the extenuating circumstances help avert the ultimate penalty. I have listened, therefore, carefully to your counsel's address on this issue why you shouldn't be sentenced to death. He told me that there was this long feud between you and the deceased as testified to by the Crown witnesses including yourself. You also told me that it is undeniable that you had taken drink that day. Countering one of these factors, the Crown properly told the Court that a long feud would only serve to aggravate the crime, because on it is based the element of premeditation which would never be of help to you at all, at all. The Crown did very properly too concede that there was an element of drink in this case. On that, and that alone, the Court finds that extenuating circumstances do exist.

S E N T E N C E

I am being given reasons why the sentence to be imposed on you should not be stiff. One of them is that you immediately went to the police to report yourself, but that was not before you had boasted to the young boys who were around there that you had killed this fellow. I have heard this evidence which showed me that you are the type of man who doesn't want to be chastised. As a young man maybe you would have protested against being chastised but that chastisement has got its own effect which I would call very beneficial effect. But now it looks like you have persistently resisted reprimand even to you at the behest of your own parents. Now, you have come to me, the deceased tried to chastise you, you ultimately killed him.

My assessors agree with me that you have got to be kept away from society for considerable length of time. I

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have been told that you have children whom you are fending for including your mother. I think your mother should be happy now that you are kept out of her sight for a while, because you ultimately killed somebody whom she had asked to put you right as if to cock a snook at her you broke the rod that was meant to correct you.

The least sentence that I can impose on you is that you go to gaol for twenty-two (22) years.

My assessors agree.

J U D G E
10th December, 1990

For Crown : Mr. Mokhobo

For Defence: Mr. Fosa