

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v

1. KATEPI MAKHENA
2. HLOMPHANG RATIPI

HELD AT QUTHING

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla  
on the 12th day of December, 1990  
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The accused have already been convicted on their own pleas of Culpable Homicide following the death of PHENDUKA MPIYAKHE on the 29th of September, 1989 at Ha Selehalo Dilli Dilli in the district of Quthing. To the original charge of Murder the accused had pleaded not guilty. And following that the preparatory depositions of P.W.2, Lwaephe Makhena, and P.W.7 Dr. Klaus were admitted and recorded in these proceedings. The Crown on its part had dispensed with the evidence of Likhang Phenduka tendered in the court below. Consequently the rest of witnesses who gave evidence in the court below gave oral evidence in this Court.

In brief the evidence for the Crown was as follows :  
The deceased was heard to say to one of the witnesses that

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he was keen on attacking accused No.1 because accused No.1 had reported to the owner of the fields where a wheat crop had been trespassed by the deceased's horses. Incidentally, when first this was adumbrated accused No.1 was present. He took exception to that and a quarrel ensued between the deceased and accused No.1. And thanks to the intervention of one Liphafa P.W.4 the quarrel ended without consequence, and accused No.1 left the spot immediately thereafter. A long while afterwards the deceased was seen to leave the place too. So did accused No.2. At a later stage on the same day both accused and the deceased were seen at a hillock by P.W.3. When P.W.3, Skhefolane, approached the scene he noticed that there was an interchange of angry words between the deceased and accused No.1. Among the words which he heard uttered by the deceased were "why didn't you take the matter to the chief" or something to that effect. Thereafter the deceased was seen to attack accused No.1 by delivering a blow with a stick which accused No.1 dodged; in response thereto accused No.1 dealt the deceased a blow on the head. In the course of the fight accused No.2 supplied accused No.1 with a stick which is before Court and that was not before accused No.2 was also seen by P.W.3 to deliver a blow on the deceased. However I am satisfied that accused No.2 did play a minor role in the event. Through questions put to the Crown <sup>witnesses</sup> it appears that at one stage he also tried to intervene.

It was further stated that a bore was also used in the assault. There was a strenuous denial through questions put to the Crown witnesses as to the role played by this bore. P.W.3 had told the Court that the bore was used by accused No.1 to hit at or jab at the wounds already inflicted on the deceased's head. What is amazing then about the bore is the fact that although it was for a lawful purpose that accused No.1 had borrowed it from P.W.4, this bore, it appears was brought to serve a legitimate purpose but some days after the incident it remained hidden among the aloes near the scene.

On this issue of pointing out one could briefly refer to the case of S. v. Moumbaris 1973(3) SA 109T where it was stated that it will suffice, i.e. the object used in carrying out an unlawful act followed by a pointing out - it will suffice if it is discovered as a result of an actual physical pointing out that the accused had knowledge of some fact relevant to his guilt. Arguing in the same vein Milne J.P., as he then was, is reported as having said:

"The effect is to admit evidence of a pointing out even though the relative confession was obtained as a result of acts of gross cruelty inflicted upon the person making it".

While at this stage I wish also to refer to the evidence which was adduced from the side of the police who gave evidence in this Court. It emerged from the cross-examination that the police are not above board in their manner in which they went about the investigation of this matter. For instance, it emerged that these accused, who are very unsophisticated from the look of things, were taken advantage of. They no doubt cooperated with the police throughout the entirety of the police investigations, but it behoved the police as a matter of Judges' rules and administrative procedure that they should have warned the accused before eliciting any information from them save their names. The purpose of a caution given to an accused person is to guard against self-incrimination by that accused person, and in its text the frame of this caution is that the accused should know after he has been cautioned that whatever then he will subsequently say might be used against him in evidence in a case that might follow. There is therefore no point in eliciting all the relevant information including statements which are incriminatory to the accused and after he has given them and laid them bare to his adversaries he should be told that now "I caution you". There is no longer any point in cautioning him, because the accused would have incriminated himself in any case. I am giving this stern

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warning that should the police persist in this type of remissness in going about their investigations cases which are brought in this Court in this way are going to be thrown out. Having said all these I should point out that a plea of guilty to the crime committed is always a sign of remorse.

I have endorsed what the defence counsel has said in his plea in mitigation including the concession by the Crown that the accused are first offenders. I have paid particular attention to the fact that the deceased himself seemed to have been playing a leading role in precipitating the bitter end to which he was a victim. But in the same vein, one would scarcely place the chief above board in his treatment of this entire matter. While on the one hand he did a good thing by admonishing the deceased against uttering threats relating to accused No.1, when he felt the need to tell accused No.1 about those threats he should have informed the deceased, too, that he has informed accused No.1 about those threats, or at best he should have called them both and asked the deceased to say in the presence of accused No.1 the sort of things that he had intimated secretly to the chief; and thereafter should have given caution or reprimand as the case might be; but it appears that uppermost in his mind <sup>was</sup> the wish to go to a stockfair.

#### S E N T E N C E

The Court cannot over emphasise the displeasure it has of people who take the law into their own hands; nor can it over emphasise the inviolability of human life. Consequently each accused is sentenced to pay a fine of M2000 or serve 5 years' jail term half of which is suspended for two years on condition that the respective accused is not convicted of an offence involving violence committed during the period of the suspension. The bore Exhibit 1 should be returned to P.W.4.

J U D G E

12th December, 1990

For Crown : Mr. Mokhobo

For Defence: Mr. Lebusa