

IN THE HIGH COURT OF LESOTHO

In the matter between:-

R E X

and

KABELO RAPAPA

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola  
on the 9th day of February, 1990.

The accused is charged with murder in that upon or about the 19th day of December, 1987 and at or near Borokhoaneng in the district of Maseru, and at or near Queen Elizabeth II Hospital in the district of Maseru, the accused unlawfully and intentionally killed 'Mathabo Rapapa (hereinafter called the deceased). The defence tendered a plea of guilty of culpable homicide which was not accepted by the Crown.

The defence admitted as evidence before this Court the post-mortem examination report prepared by Dr. Oliver who formed

the opinion that death was due to massive haemorrhage due to multiple stab wounds on the chest and back. He found a 3cm incised wound on the right mid-axillary line, six stab wounds on the left mid-axillary line, five different stab wounds at the back, four different stab wounds on the chest and a 5cm. incised wound in the right palm. Internally he found that the right auricle and the inferior vena cava were perforated, the right lung had collapsed and there was blood in the pleural cavity. The post-mortem examination report was marked Exhibit A.

The accused and the deceased were man and wife and were staying at Borokhoaneng where 'Malebohang Tseko (P.W.3) was their landlady. Their house was about sixty yards from that of 'Malebohang. On the 19th December, 1987 between the hours of 12.00 noon and 1.00 p.m. 'Malebohang was at her house with 'Matieho Mokhethi (P.W.4) when her children reported to her that the accused was assaulting the deceased. She went to accused's house and heard that there was a scuffle in the house and the deceased was crying. The door was locked. She knocked very hard at the door and ordered the accused to open. He refused. She peeped through the window and saw that the accused was stabbing the deceased all over the body with an iron rod sharpened on one end - Exhibit 1. She ordered him to stop stabbing the deceased but he refused.

Finally 'Malebohang asked her children to call her neighbour, 'Mampho 'Nyane (P.W.5). She came immediately and they both shouted at the accused pleading with him to stop stabbing the deceased. After

a long time the accused opened the door and the deceased came out crawling. Her face and body were covered with blood and she was unable to stand. They took her to 'Malebohang's vehicle and carried her to Queen Elizabeth II Hospital. Before they left for the hospital 'Malebohang advised the accused to go and report himself to the police but he refused. Upon her return from the hospital the accused came to her house and tried to talk to her but she said she did not want to talk to him and again ordered him to go and report himself to the police. He said he could not do so before he had killed his wife.

'Malebohang said that she took the threat seriously but thought that the deceased was safe in the hospital and that was the reason why she did not alert the hospital authorities or the police. When the accused opened the door he appeared to be very angry and moved around the vehicle still wanting to assault the deceased. She says that she did not observe whether or not the accused was drunk because he was already fighting when she saw him that day. On the following day when she went to the hospital she found that the deceased had died.

The evidence of 'Matieho Makhethi is the same with that of 'Malebohang. She worked for 'Malebohang as a domestic helper and was present when 'Malebohang and 'Mampho 'Nyane pleaded with the accused to stop stabbing the deceased and to open the door. She says that while they were putting the deceased into the vehicle the accused came to them and said that he wanted to finish her off. 'Malebohang said he must kill both of them i.e. herself and the deceased. The accused said he would finish her off at the hospital.

She explained that she did not go to Upper Thamae police station to report the assault because the deceased was taken to the hospital.

'Mampho 'Nyane confirms that she also went to the house of the accused and found that the door was locked. About ten minutes after her arrival the accused opened the door and the deceased came out crawling. As they were putting the deceased into the vehicle the accused came and said to the deceased: "I shall kill you". The deceased was carried to the hospital and was admitted. Upon their return from the hospital she went to her home. Later that afternoon the accused came to the gate of her yard and called her. She came out of her house and he asked her where the woman was. She said they had left her at the hospital. He asked if she was still alive. Her answer was in the affirmative. He then asked when visitors are allowed to see their patients at the hospital. She said at 6.00p.m. Accused then said he wanted to go and finish her off. 'Mampho says that she did not take accused's threat seriously and regarded it as an empty threat despite the fact that the accused appeared to be still very angry.

Selloane Maepe (P.W.6) is a nurse stationed at Queen Elizabeth II Hospital. On the 19th December, 1987 she was on duty in Ward 2. The deceased was admitted in her ward with multiple stab wounds which had already been bandaged at casualty department. She put her in bed and immediately went to the laboratory to get some blood because she had lost a lot of blood. On her return from

the laboratory the deceased reported to her that the accused came during her absence and spoke to her in a manner she did not like. Selloane says that she asked for help from the security department of the hospital. A security guard came but after some time she told him to go back to his work. A few minutes after the security guard had returned to his post she saw a person rushing into her ward. She again went to the security department but when she came back with the security officer the person she had seen was no longer there. The deceased was in a pool of blood on the floor and several nurses were helping her. She was taken to the theatre but died on the following morning.

'Matseleng Moshesha (P.W.7) is a nursing sister at Queen Elizabeth II Hospital. On the 19th December, 1987 she was on duty in the private ward when at about 5.30 p.m. she heard people screaming inside the hospital. She and other nurses rushed in the direction from where the screaming came. They met many patients in the passage but eventually came to Cubicle A in Ward 2. They found the deceased in a pool of blood on the floor. She examined the patient and found that she had a big wound on the chest and a lot of blood was coming out. She was carried to the theatre.

Mokhethi Mokhethi (P.W.8) is the security officer referred to by Selloane. He confirms that she called her to Ward 2 but when he arrived she said that he must go back to his work. He complied. After about thirty minutes the same nurse called him again. He proceeded to Ward 2 but met patients in the passage. They were crying. He ran to the gate near Blood Bank and found a soldier near the gate and calling a man who was standing on the other side of

the road running between the hospital and Blood Bank. He went to that man with the soldier and the man said he had not done anything. The soldier struck him on the head with a rifle but the man still denied that he had stabbed any person. They asked him if he had any knife. He said he did not have any knife and continued to deny till they beat him up. When they came to the duty-room he still denied having in his possession any knife. They again beat him up and he then took out a knife - Exhibit 2 which was covered with fresh blood. That man was the accused. He was later handed over to the police who took him to the casualty department where the wound which he sustained when the soldier struck him with a rifle was sutured. Exhibit 2 was given to the police.

Teboho Thujane (P.W.9) is the deceased's elder brother and he identified her corpse to the doctor who performed a post-mortem examination upon it.

The evidence of Detective Trooper Ramakeoane is to the effect that on the 22nd December, 1987 he went to the home of the accused accompanied by the accused. On their arrival there the accused produced an iron rod (Exhibit 1) and gave it to him. There was dry blood on the floor and clothes were scattered all over the floor.

Trooper Nono was called to the hospital on the 19th December, 1987 and found the accused with many people inside the hospital. He looked wild and was forcing his way through those people in an attempt to go where his wife was. Trooper Nono says that he was

given a knife (Exhibit 2) by one of those people but he does not know who that person was because he did not take his or her particulars. He denies that the accused had any wound on his head. He arrested the accused and took him to the central charge office. On the following day he charged him with murder after he received a report from the hospital that the deceased had died.

The evidence of Trooper Nono may be discarded without any delay by showing that he is either a liar or a not very observant person. For him not to have seen the wound on the head of the accused is unbelievable because he was covered with blood as well as his shirt. He did not take the particulars of the soldier and the man who gave him Exhibit 2 nor the name of any of the patients who might have seen what happened in Ward 2. In short he made a mess of the investigation of this case. Detective Trooper Ramakeoane must be equally blamed because when the accused was handed over to him he apparently made no attempt to find the soldier and a witness from Ward 2.

The accused told the Court that he married the deceased in 1983 and that they have one child who was born in 1985. The deceased worked at Maseru Cabanas Hotel and he worked for the Highlands Water Project as a driver and his station was at Ficksburg. He told the Court that during the week prior to the 19th December, 1987 his wife never came home. On Monday, the 14th December, 1987 he came home at about 6.00p.m. and found that the

deceased was not there. He went to a hotel and bought liquor and food. He returned to his home at 10.00p.m. and found that the deceased was still not there. He slept in the truck because he had no spare key. He woke up at 4.00a.m. and found that the deceased had not arrived. Before he went to work he bought a new lock and changed the lock when he came home that evening. The deceased never came home for the whole of that week and he drank liquor very excessively that week. He used to come home very late after 10.00p.m.

On Friday night he went to a bar and drank beer until 10.00 p.m. He then bought one big bottle of Gilbeys Gin and three beers and carried them to his home. He sat down alone and drank the gin and the beers until 4.00a.m. when he slept. He woke up at 8.00a.m. On the previous day he had made a telephone call to Maseru Cabanas and he was told that the deceased still came to work as usual.

When he woke up at 8.00a.m. on Saturday a certain Makau or Matsau came and took him to town. He did not stay in town for a long time because he was feeling tired. He returned to his home but one Samuel Makabane came and took him to Qoaling. He returned to his home and again drank several beers before going to Thamae's where he continued to drink beer. From Thamae's they proceeded to Lower Seoli but on their way they saw the deceased who appeared to be heading for home. She got into a taxi going to town. They followed it and stopped it. The deceased alighted only after the passengers had ordered her to do so.



The accused told the Court that on their arrival at their home he asked the deceased where she had been for the whole week. She simply looked at him and did not answer him. He repeated the question. She asked him why he was asking her that question. He slapped her because she had answered him in a rude manner. She fell down and took Exhibit 1 and threw it at him and said he must leave her alone because she no longer loved him. He took Exhibit 1 and stabbed her with it but he does not know how many times. He stopped stabbing her when he noticed that her face was covered with blood. He opened the door and found 'Malebohang and asked her to take the deceased to hospital. She agreed and conveyed her in her vehicle. He denies that he went near the vehicle and tried or threatened to stab the deceased again. However, he does not remember that 'Malebohang advised him to go and report himself at the charge office, nor does he remember that he said he would go to the hospital and finish off the deceased.

After his wife was taken to the hospital he decided to go to the central charge office but on the way he met two people who invited him to a bar where he drank some beer but he does not know the quantity. From there he went back to his home but he does not know what he did there. He again left for the Central Charge Office. He remembers that from the bus rank he walked along Kingsway Road and when he came opposite the National Library a man carrying a rifle called him. He stopped and when the man came to him he asked him where he was going to. He said to the charge office. He does not know what happened after that but

when he came to he noticed that he was lying on the ground and had sustained a wound on the left side of his head. He was escorted to the hospital and searched. Exhibit 2 was found in the pocket of his shirt and it was covered with blood from the wound he had sustained.

In cross-examination the accused told the Court that he does not know that he went to the hospital and cannot deny the fact that he went there. He says that at their home he stabbed the deceased because she had provoked him and he lost his power of self control. Before the present incident he had never had a quarrel with his wife.

Mr. Matsau, attorney for the defence, conceded that there was no dispute that the accused assaulted his wife at Borokhoanang on the 19th December, 1987. He submitted that because of intoxication the accused had no direct intention to kill the deceased. If the accused had direct intention he could not have opened the door to allow the deceased to go to the hospital. He argues that at worst it may be held that the accused was reckless as to what would be the consequences of his assault.

For the defence of intoxication to succeed the defence must establish two very important points; namely, that the accused was so drunk that he did not know that what he was doing was wrong or that he did not know what he was doing. See section 2 of the Criminal Liability of Intoxicated Persons Proclamation No.60 of 1938. The accused remembers in great detail what he did from

about 8.00a.m. when he woke up until he met the deceased by chance at a bus stop. He took her to their home and remembers what the deceased said to him and what she did before he started to stab her with Exhibit 1. I am of the opinion that he does not remember how many times he stabbed her with Exhibit 1 not because of intoxication but because he stabbed her so many times that he could not count. He knew very well what he was doing because up to the time when he started stabbing the deceased he was aware of what was happening around him. I do not agree with suggestion that he suddenly became unaware of what he was doing.

I do not agree that the accused may not have formed direct intention to kill the deceased because he opened the door to allow her to come out. After opening the door the accused told the Crown witnesses that he would not go to the police to report himself before he had finished off the deceased. Mr. Matsau has submitted that the evidence of the Crown witnesses on this point should not be believed because they contradict each other. I do not think that there is any contradiction in their evidence concerning the threat that he would finish off his wife. The three women who were carrying the deceased into the vehicle must have been in a state of confusion and great fear because the accused was there near the vehicle or going around it uttering those threatening words. If there is a minor contradiction in their evidence it is understandable under the circumstances. They may not have heard the same words because they were busy carrying the deceased into the vehicle while the accused was moving about making the threat to kill his wife.

The Crown witnesses have denied that after opening the door he said the deceased should be taken to the hospital. I believe their story on this point because if the accused had intended that the deceased should be taken to the hospital he could not have made the threat. 'Malebohang testified that he was moving around the vehicle and wanting to stab the deceased again. She reprimanded him and closed the door of the vehicle.

'Mampho 'Nyane testified that after they had returned from the hospital the accused came to her place and asked her about visiting hours at the hospital and whether the deceased was still alive. When she told him that she was still alive and that the visiting hour was 6.00p.m. he said he wanted to go and finish her off.

It seems to me that the accused expressed his direct intention to go to the hospital and to kill the deceased. Now the question is whether he did go to the hospital. It is not seriously disputed that some person did go to the hospital and stabbed the deceased on the chest. The evidence of Selloane Maepe who is a nurse at the hospital is that the deceased told her that during her (Selloane's) absence the accused came to her and said things she did not like. She summoned the security guard as she feared that the accused would come back. For some reason after a short time she ordered the security guard to go back to his post. About thirty minutes later she saw a man rushing into her ward. She again went to the security department but when she came back the deceased was lying in a pool of blood on the floor. The man she had seen was no more there.

According to the security guard, one Mokhethi Mokhethi; after the alarm was raised he ran out of the hospital and found a soldier near the gate on the western side of the hospital. He was calling the accused who was on the other side of the road. They went to the accused and arrested him.

During the inspection in loco I observed that the accused was found almost directly opposite the gate on the western side of the hospital; he was about forty-four (44) paces from Kingsway Road into High Court Road which runs on the western side of the hospital. The question one may ask is, if the accused was going to the central charge office what did he want at the gate of the hospital which is about 44 paces from where he would be if he was going to the central charge office. The indications are that the accused was coming out of the hospital where he had just finished off his wife like he had expressed his intention to the Crown witnesses that he would do so. It is significant that when the accused was asked by the soldier and the security guard whether he had any knife in his possession, he said he did not have any. It was only after they had beaten him up that he produced a brand new knife. Its blade was covered with fresh blood which had started to coagulate. It is significant that its handle was not covered with any blood. If the blood came from the wound on the head of the accused the whole knife ought to have been covered with blood.

Mr. Matsau has submitted that the evidence of Selloane should be rejected because what the deceased told her was not a dying declaration envisaged by section 226 of the Criminal Procedure and Evidence Act, 1981. The requirement of expectation of death has been summed up in R. V. Abdul 1905 T.S. 119 at p. 122-3 by Innes, C.J. by saying:

"The rule is that three things must have concurred. The person must have been in danger of impending death; he must have realised the extent of his danger so as to have given up all hope of life; and death must have ensued."

He submitted that the Crown has failed to adduce evidence to lay down the basis for the said requirements. I agree with this submission. Furthermore the declaration cannot be a dying declaration on the second ground that it was not intended to prove the declarant's death. The deceased was not saying that the accused had come and stabbed her again. Her story is inadmissible hearsay that the accused came to the hospital and said unpleasant things to her. I shall disregard it in making my decision on this point.

I reject the version of the accused that he was found between the National Library and the Blood Bank by the soldier and Mkhethi Mkhethi. His evidence is that he does not deny that at one time he was at the hospital, but at the same time he tries to deny that he went to hospital. He is an unreliable witness.

have formed the opinion that he did go to the hospital and stabbed the deceased with the knife - Exhibit 2 which was later found with a bloody blade.

Mr. Matsau further submitted that the Crown has not established beyond a reasonable doubt that the deceased incurred further injuries at the hospital. In this regard he asks the Court to compare the evidence of Selloane Maepe and Matseleng Moshesha. The latter said that the deceased was not bandaged when she arrived at the scene while Selloane says that she did not examine deceased's wounds when she was on the floor. He submits therefore that it cannot be held with any amount of certainty from the evidence of the Crown that the deceased suffered further attacks at the hospital.

I think Mr. Matsau has not stated the facts correctly. Selloane's evidence is that the wounds of the deceased had already been bandaged at the casualty department but that she did not examine them very closely. She immediately went to the laboratory to get blood because the deceased had lost a lot of blood. Matseleng Moshesha does not in any way contradict Selloane. Her evidence is that when she came to Cubicle A in Ward 2 the deceased was on the floor and had a big wound on the chest and a lot of blood was coming out. There is no doubt in my mind that this was a fresh injury which was not there when Selloane left for the laboratory. She had put the deceased in the bed and would have seen that big wound if it was there when she put her in bed.

The last question is whether the accused was provoked or not. I think this question must be answered in the negative. The story of the accused is not only improbable but it is false beyond reasonable doubt. He alleges that his wife failed to come home for the whole week. He knew where she worked but never went there to find out what was wrong. He alleges that he made a telephone call to her place of work and he was told that she was still coming to work. Instead of going to her place of work at 7.00p.m. when he arrived at home he went on a drinking spree for the whole week.,

In S. v. Ndhlovu (2) 1965 (4) S.A. 692 at p. 695 Holmes, J.A. said:

"Intoxication is one of humanity's age-old frailties, which may, depending on the circumstances, reduce the moral blameworthiness of a crime, and may even evoke a touch of compassion through the perceptive understanding that man, seeking solace or pleasure in liquor, may easily over-indulge and thereby do the things which sober he would not do. On the other hand intoxication may, again depending on the circumstances, aggravate the aspect of blameworthiness (see sec. 350 of the Code) as, for example, when a man deliberately fortifies himself with liquor to enable him insensitively to carry out a fell design. In the result, in seeking a basic principle in regard to intoxication and extenuation in murder cases, it is neither necessary nor desirable to say more than that the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and in essence one is weighing the frailties of the individual with the evil of his deed".



Is it not reasonable to conclude that in the present case the accused went on a drinking spree in order to fortify himself with liquor to enable him insensitively to carry out a fell design? I am saying this because the elder brother of the deceased, Teboho Thulane (P.W.9) testified that on the 18th December, 1987 the deceased came to her maiden home and reported that she had marital problems in Maseru. His story is undoubtedly hearsay but the conduct of the accused clearly confirms the story that they had marital problems and that was the reason why she stayed away from home for such a long time. If it were not so the accused would have made immediate inquiries about her disappearance. He did not do anything because he knew that they were having problems with his wife and was not at all surprised when she avoided going home for a full week.

The accused says that he lost power of self-control when the deceased told him that she no longer loved him. He slapped her and she fell down. When she rose she picked up Exhibit 1 and threw it at him. She missed him. Then he took Exhibit 1 and stabbed her with it so many times that he does not remember how many. It seems to me that the words that "I do not love you any more" were not enough to provoke an ordinary person of the class of the community to which the accused belongs. As I have already stated above the accused knew why his wife was not coming home and that could not be regarded as a sudden provocation. He had become used to it and was taking no proper steps to find out why she was

not coming home because he knew the cause. I am of the opinion that the provisions of the Criminal Law (Homicide Amendment) Proclamation No.42 of 1959 do not apply to the present case and that provocation is not available to accused as a defence.

In any case even if it can be found that he was provoked he did not kill the deceased at Borokhoaneng but at Queen Elizabeth II Hospital. He cannot claim that he was still provoked when he came to the hospital.

I have found that there is overwhelming circumstantial evidence that the accused did go to the hospital and finished off his wife. He had expressed his intention to the Crown witnesses and subsequently carried out his intention. He denied that he had a knife when he was asked by the soldier and the security guard because he wanted to distance himself from the events that had just taken place at the hospital. In my view this is a clear case of dolus directus. The killing of the deceased was so well planned that the accused cannot be heard to say he was drunk. No drunken person can plan his actions so well. Had it not been because of the unknown soldier who stopped him at the gate it would never be known who killed the deceased.

In my view the accused is guilty of murder and I convict him accordingly.

My assessor agrees.

J.L. KHEOLA  
JUDGE

9th February, 1990.

Extenuating Circumstances

The Court has convicted the accused of murder; it is now its duty to determine whether or not there are extenuating circumstances. The onus is on the accused to show that there are extenuating circumstances. He must convince the Court on a balance of probabilities of the existence of such circumstances (R v Lembete, 1947 (2) S.A. 603 (A.D); R v Balla and others, 1955 (3) S.A. 274 (A.D.).

Mr. Matsau submitted that at the time the accused committed the offence charged he was drunk. His mind was so affected by the intoxicating liquor that the Court must take this factor into account. The evidence of the accused is that he drank liquor for almost the whole night because he only went to bed at 4.00 a.m. after he had been drinking beer. He woke up at about 8.00 a.m. and started drinking at various places until he met the deceased at about 12.00 noon and took her to their home <sup>where</sup> he assaulted her. There is no doubt that at the relevant time the mind of the accused was under the influence of liquor and it is not necessary to determine the exact degree to what it was affected. The most important thing to determine is the quantity of the liquor consumed by the accused before the commission of the offence. In the present case the quantity was very large.

The only question which remains to be answered is the one posed by the Court in its reasons for judgment - whether it is not reasonable to infer that the accused deliberately fortified himself with liquor to enable himself insensitively to carry out a fell design. The question was not positively answered then but must now be answered because the answer to it will determine whether intoxication is to be taken as a mitigating factor or not.

There is no direct evidence that the accused took liquor or went on a drinking spree for the whole of that week because he wanted Dutch courage so that he could insensitively kill his wife. It is also not the only reasonable inference to be drawn from the proved facts that he had the death of his wife in mind when he over-indulged in intoxicating liquor. He may have sought solace in liquor when he discovered that his wife had deserted him. I am of the opinion that intoxication should not be rejected out of hand as a factor that may be taken into consideration when mitigating factors are determined. This should be done despite the fact that it was rejected as a defence.

The question of provocation was also rejected as a defence on the ground that even if it can be assumed that the assault at the marital home at Borokhoaneng followed what amounted to provocation, the assault at the hospital took place too long after the provocation at Borokhoaneng. The accused's anger must have cooled down during a period of well over two hours. For purposes of mitigation I shall take into consideration the fact that according to their former landlady 'Malerato Moketa (D.W.3), the couple did not live happily

together and had several fights during the three years they rented her house. It seems that the incident presently under consideration might have been the last straw.

The cumulative effect of drunkenness and provocation lessens the moral blameworthiness of the accused. I find that there are extenuating circumstances .

Sentence:

The fact that the accused went to the hospital and killed his wife is an aggravating factor. On the factors which mitigate sentence we took into consideration that he is a first offender. He has a minor child to bring up; he was drunk and provoked.

For the reasons stated above we thought that a sentence of seventeen (17) years' imprisonment would be a deterrent one and sentenced him accordingly.

My assessor agrees.

J.L. KHEOLA  
JUDGE

12th February, 1990.

For the Crown - Mr. Mokhobo  
For the Defence - Mr. Matsau.