CRI/T/3/90

IN THE HIGH COURT OF LESOTHO

In the Matter of :

R E X

V

LICHABA MASILO

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 8th day of March, 1990.

Held at Quthing

The accused appears before me charged with the crime of murder on the following allegations:

> "On or about 2nd June, 1988 and at or near Daliwe Ha Setsumi in the district of Quthing, the said accused did unlawfully and intentionally kill 'Makhothatso Raleaoa".

When the charge was put to him, the accused pleaded not guilty.

At the commencement of the trial Mr. Z. Mda, who represents the accused, informed the court that the defence would admit the depositions of Lejone Raleaoa, 'Mahopolang Masilo, Lenka Raleaoa, Tper Moshe and D/Tper Kolobe who were respectively P.W.2, 3,4,5 and 6 at the proceedings of the Preparatory Examination. Mr. Mokhobo for the crown accepted the admissions made by the defence counsel.

2/ In terms of .....

In terms of the provisions of S.273 of the Criminal Procedure and Evidence Act. 1981, the depositions of Lejone Raleaoa, 'Mahopolang Masilo, Lenka Raleaoa, Tper Moshe, and D/Tper Kolobe were admitted in evidence. It was, therefore, unnecessary to call the deponents as witnesses in this trial.

By consent of both counsels the post mortem examination Report was handed in from the bar as Exhibit "A". It was likewise unnecessary to call the medical doctor who had performed the autopsy as a witness in this trial.

In as far as it is relevant, the evidence of Tper Moshe was to the effect that on 2nd June, 1988 he received a report as a result of which he proceeded to the village of Ma-Aoweng in the area of Daliwe Ha Setsumi where he found the dead body of the deceased lying in the village. He examined the body for injuries and found that it had sustained a single wound on the left side of the chest. He caused the body to be carried to a spot next to the public road where it was taken away in a police vehicle on the following day.

This is confirmed by Lenka Raleaoa who testified that he accompanied the body of the deceased to the spot next to the public road and then to Ralebona clinic. From the clinic he accompanied the deceased's body to the mortuary at Quthing Government hospital. It sustained no additional injuries whilst it was being transported from the village of Ma-Aoweng to the mortuary. I shall return to the evidence of Lenka Raleaoa later in this judgment.

According to the post-mortem Examination Report (Exh A), on 6th June, 1988 a medical doctor, at Quthing Government hospital, performed an autopsy on a dead boy of a female African adult. The

3/ body was .....

body was identified as that of the deceased, 'Makhothatso Raleaoa, by Seabata Raleaoa and Lejone Raleaoa.

This is confirmed by Lejone Raleaoa who testified that the deceased was his wife and the accused his brother-in-law. The accused's sister was married to his elder brother. On 2nd June, 1988 he noticed the accused standing on the forecourt of a house belonging to his (Lejone Raleaoa's) elder brother in the village of Ma-Aoweng. He invited the accused to the feast which was being hosted by one Bonang in the village. The accused obliged. Shortly thereafter the two men were joined by the deceased. The trio then walked together to the place of the feast. I shall return to the evidence of Lejone Raleaoa in a moment.

The external examination of the deceased's body by the medical doctor revealed that the body had sustained a superficial laceration below the (R) eye, a 1 cm long sharp edged wound on the insertion (beginning) of the 3rd rib on the left side of the chest. The wound had cut the cartilage of the 3rd rib through the sternum or breast bone.

On opening the body the medical doctor found that the wound on the chest had penetrated into the heart, severing the right ventricle. The pericardial sac was filled with blood some of which was also found in the left side of the chest cavity.

From these findings the medical doctor formed the opinion that death was due to sudden heart failure which had occurred instantly as a result of the severing of the (R) ventricle of the heart. The injuries were consistent with the use of a sharp instrument.

4/ I can think .....

I can think of no good reasons why the opinion of the medical doctor that the deceased died as a result of the chest injury should be doubted. That being so, the salient question is whether or not the accused is the person who inflicted the injury upon the deceased and, therefore, brought about her death.

In this regard, P.W.1, 'Mamotseko Kotelo, told the court that on the day in question, 2nd June, 1988, she attended the feast that was hosted by Bonang in the village of Ma-Aoweng at Daliwe. Save for about an hour when at 5 p.m. her father called her to his house, she spent virtually the whole day at the feast with the deceased who was, in fact, the wife of her parternal uncle.

At about between 8 p.m. and 9 p.m. she and the deceased went to fetch beer from the latter's house which was some distance away from the place where the feast was held. On the way the accused who had apparently been following them called at the deceased and demanded that she should stop or come to him. The deceased ignored the accused's demand and the two women simply continued on their way to her house. They took the beer to the place where the feast was held.

On the way back to the place of the feast, P.W. 1 and the deceased found the accused still waiting at the spot where they had left him on their way to the deceased's house. The accused again called at the deceased and angrily told her to stop. Because of the rude manner in which the accused told the deceased to stop, P.W.1 suggested to her that she should run away - A suggestion which was, however, declined by the deceased who told P.W.1 that she knew the accused would beat her up if she dared ran away. The accused then came to the two women and violently caught hold of the deceased.

5/ According to .....

According to her, P.W.1 left the accused and the deceased together and continued alone to the house where the feast was held, just a short distance away. She had hardly entered into the house when she heard an alarm being raised from the direction in which she had left the accused and the deceased. She and many other people rushed to the scene. On arrival at the spot where she had left the accused violently holding the deceased P.W.1 found the latter lying prostrate on the ground. She was already dead.

Now, coming back to his evidence, Lejone Raleaoa further testified that some time after he, the deceased and the accused had come to the place where the feast was held, he had the occasion to go to the home of one Seabata Raleaoa in the village, leaving the accused and the deceased at the feast. Whilst at the home of Seabata, he heard scream as a result of which he rushed in the direction from which the scream came. When he reach a certain spot in that direction he found the deceased lying prostrate on the ground. She was already dead.

Returning to his evidence, Lenka Raleaoa further testified that on the evening in question he was at his home when he received a certain report from Bonang, who was, however, not called as a witness in this trial. Following the report, he raised an alarm and rushed to the spot where the deceased was found dead. As a result of the alarm many people came to the scene. He subsequently reported the matter to the chief and the police.

D/Tper Kolobe testified that on 28th July, 1988 he was stationed at Mt. Moorosi when he received a message following which he came down to Quthing police station. At the police station he

6/ met the .....

met the accused who gave him a certain explanation as a result of which he and the accused proceeded to a place called Ha Piti. He reported himself to the chief of the area. A messenger was detailed to accompany him to the home of 'Mahopolang Masilo. From the home of 'Mahopolang the accused produced a knife which he handed over to the police officer. This is confirmed by 'Mahopolang Masilo according to whom the knife was the property of the accused.

The accused gave evidence on oath in his defence and his version was completely different from that of Lejone Raleaoa and P.W.1. First of all, it is common cause that the accused lives in a neighbouring village to that of Ma-Aoweng. According to him, the accused spent greater part of the day in question at the house of Lejone Raleaoa who, as it has already been pointed out earlier, is his brother-in-law. He was drinking beer in the company of Lejone Raleaoa himself, the deceased and P.W.1. It is, however, worth remembering that in his evidence, Lejone Raleaoa testified that it was only in the evening of the day in question, 2nd June, 1988, that he noticed the accused standing on the forecourt of his elder brother's house in the village of Ma-Aoweng. It was only then that he invited the accused, not to his house but to the place of the feast. The evidence of Lejone Raleaoa contradicted, therefore, the accused's story that he had spent greater part of the day in question drinking beer with him at his house. Furthermore, the accused's story was in that regard also contradicted by the evidence of P.W.1 according to whom she was with the deceased at the feast hosted by Bonang on the day in question.

Indeed, it is significant to mention that in her evidence P.W.1 testified, on oath, that she was a close relative of Bonang and did not drink alcoholic beverages at all. As her close relative she had a family duty to assist at the feat that was being hosted by

Bonang. The accused's suggestion that she could have spent greater part of such a day drinking beer at the house of Lejone Raleaoa was, therefore, preposterous.

I must say I find it unconvincing that both Lejone Raleaoa and P.W.1 would fabricate against the accused on such apparently innocent issue. The truth of the matter is that the accused's story that he spent greater part of the day in question drinking beer with P.W.1, the deceased and Lejone Raleaoa at the latter's house is nothing but a figment of his imagination which I have no hesitation to reject as false.

Be that as it may, the accused did concede that later on the day in question, he went to the place where the feast was held. He conceded further that whilst drinking at the feast, Lejone Raleaoa went to the house of Seabata Raleaoa in the village of Ma-Aoweng leaving him and the deceased at the feast. At about 10 p.m. P.W.1 and the deceased left the place of the feast to fetch beer from the latter's house. At that time he too left for his home village. As he was very drunk and walking slowly he arrived home at 2 a.m. i.e. it took him four(4) hours to reach his house in the neighbouring village which according to him was more or less 6 kilometers (ind.) from the village of Ma-Aoweng.

It is perhaps convenient to mention at this juncture that in view of the fact that the accused had clearly testified that he had left the village of Ma-Aoweng at 10 p.m. and arrived home at 2 a.m. he was asked whether he could read a watch. He replied in the negative and was quick to elaborate that the watch he was wearing on his wrist was nothing but a mere decoration. I considered it incredible that the accused who could not read a watch, as he wanted this court to believe, would be so positive that he left Ma-Aoweng at 10p.m. and

8/ arrived at his .....

arrived at his home village at 2.00 a.m. There is not the slightest doubt in my mind that the accused is a liar of the first order.

In any event, what is of importance in this case is that in his evidence the accused denied P.W.1's story that when she and the deceased went to fetch beer at the latter's house he followed them and called at the deceased to stop or come to him. He in fact raised the defence of alibi and said he was, at the time, on his way to his home village. He could not, therefore, have been at the spot P.W.1 alleged he was.

I am mindful of the fact that the events which P.W.1 says took place at the time she and the deceased were fetching beer from the latter's house occurred during the night when there was no light and the vicibility was not all that good. It is, therefore, basically a question of whether or not P.W.1 had a good opportunity to identify the accused.

It was, however, common cause that P.W.1 and the accused had known each other well for many years. Indeed, in his own mouth the accused told the court that P.W.1 was a one time fiance of his own elder brother who, however, turned down the relationship on the influence of his parents. P.W.1 then blamed him for the break down of the relationship. Of course, P.W.1 denied the accused's story that any such relationship ever existed between her and his elder brother and told the court that the accused's story was just another of his park of lies before this court. Apart from the fact that the accused and P.W.1 knew each other well, it must be borne in mind that according to the latter she and the deceased twice met the accused on their way to and from the deceased's house. On both occasions the accused spoke to the deceased in the presence of P.W.1. That being so, it

9/ seems to me .....

seems to me that P.W.1's chances of mistaken identity were greatly reduced for in my view, one does not need light to identify a person by his voice if one knew the voice of that person well.

In the present case, I have no doubt that as acquaintances of many years both the accused and P.W.1 know each other well, not only facially but also by their voices. When the accused spoke to, and eventually caught hold of, the deceased, P.W.1 was so close to them that it would be unreasonable to suggest that she could have mistaken the identity of the accused by his voice. I am prepared, therefore, to accept as the truth P.W.1's story that she positively identified the accused, at least by his voice, as the person who called at the deceased to stop i.e. at the time she and the deceased were going to the latter's house and at the time they were returning from the deceased's house when he (accused) violently caught hold of the deceased and, in a rude manner, told her to stop or come to him. I reject as false, therefore, the accused's denial and his version that he was, at the time, on his way to his home village.

True enough, there is, in this case, no direct evidence that the accused is the person who inflicted up the deceased the injury that brought about her death. There is, however, plenty of circumstantial evidence which I accept, that the accused is the person who on the first occasion called at the deceased and demanded that she should stop. When the deceased failed to respond to his demand the accused was the person who, on the second occasion, angrily called at the deceased and, in a rude manner, again told her to stop. He was eventually seen manhandling the deceased who, shortly, thereafter, was found fatally injured at the very spot where the accused had been vilently holding her. The accused himself had

10/suddenly

disappeared into thin air. Indeed, the accused subsequently took the police officers to the home of 'Mahopolang Masilo from where he produced a knife which was admittedly his property.

From all this circumstantial evidence, it seems to me reasonable to infer that the answer to the question I have earlier posted viz. whether or not the accused is the person who inflicted upon the deceased the injuries that brought about her death must be in the affirmative. That being so, the only question that remains for the determination of the court is whether or not in assaulting the deceased as he did the accused had the requisite subjective intention to kill.

It is clear from the evidence I have accepted that the accused assaulted the deceased and inflicted upon her a fatal wound on the chest, which is a vulnerable part of a human body. When he thus assaulted the deceased on the upper portion of the body the accused was aware that death was likely to occur. He nonetheless, acted reckless of whether or not it did occur. Consequently, I have no alternative but to come to the conclusion that in assaulting the deceased as he did, the accused had the requisit subjective intention to kill, at least in the legal sense.

I accordingly find him guilty of murder as charged.

Both my assessors agree with this finding.

B.K. Molai
JUDGE

8th March, 1990.

For Crown : Mr. Mokhobo
For Defence: Mr. Z. Mda.

EXTENUATING CIRCUMSTANCES

I have already convicted the accused person of murder and the court is now enjoined by Section 296 of the Criminal Procedure and Evidence Act, 1981 to state whether or not there are extenuating circumstances, viz. factors which tend to reduce the moral blameworthiness of the accused's act.

In this regard the court has been invited to consider the youthfulness of the accused. It is alleged that at the time of the commission of this offence he was only eighteen years. It is, however, significant that as she testified on oath before this court, P.W.1 kept on referring to the accused as "Abuti" a term which suggests that the accused is older than her. The accused himself has not disputed that P.W.1 is younger than him. Indeed, at one time he referred to her as "ngoananyane" - a diminitive of the word"ngoanana" - thus suggesting that P.W.1 is younger than himself. P.W.1 has, however, told the court that her age is twenty-six years. If he were older than her, the accused cannot, in my view,be eighteen.

In any event, the question of the estimation of the accused's age is a matter which is entirely within the court's assessment. Although the accused told the court that he is eighteen years old, it is to be observed that according to the charge sheet he is twenty years old. I have myself looked at the accused and assessed his age as around twenty-five/twenty-seven years. For purposes of extenuating circumstances a youth is a person who is eighteen years and below. In my assessment the accused is far older than that. Although the accused is still relatively young, I am not prepared to treat him as a youth of about eighteen or below.

12/ There was .....

There was, however, evidence that the accused had been drinking on the day in question. There was a feast in the village of Ma-Aweng. The accused attended the feast and was seen at least by Lejone Raleaooa, drinking at the feast. The evidence of Lejone Raleaooa is corroborated by the accused himself who also testified that he had been drinking beer at the feast.

Assuming the correctness of the evidence that the accused had been drinking beer at the feast it stands to reason that the beer must have affected his mind and was, therefore, intoxicated on the day in question. It is common knowledge that when people are intoxicated after taking alcoholic beverages their minds are so affected that they do things they would not do when sober. It is trite law that intoxication is a factor that can properly be taken into account for purposes of extenuating circumstances.

As Mr. Mda, counsel for the defence, has rightly pointed out, there is no evidence indicating that the accused had planned or premediated the death of the deceased. The absence of premeditation is, in law, a factor that can properly be taken into account as extenuating circumstance.

In the circumstances, I come to the conclusion that there are extenuating circumstances in this case. viz. intoxication and the absence of premeditation of the deceased's death. The proper verdict is, therefore, that the accused is guilty of murder with extenuating circumstances.

SENTENCE:

Coming now to the question of sentence, I am informed by the Crown Counsel that the accused has no previous convictions. I take it,

13/ therefore, ...

therefore, that he is a first offender

The court has also been invited by Mr. Z. Mda, counsel for the defence to consider a number of factors in mitigation of the accused's sentence. He has so eloquently tabulated them that there is no need for me to go over them again, save to say I take them all into consideration.

My attention was called to the words of the famous English writer, Shakespeare, that "Justice is always tempered with mercy". These are words of wisdom. However, I must at the same time point out that the court over which I am presiding is a court of Justice and not mercy. What should be of utmost consideration to the court is that the accused has been convicted of a serious offence calling for a commensurately serious punishment.

I am perturbed by the fact that the accused went to a feast where many people had gathered, carrying a knife. Far too many people have lost their lives by the use of knives in this country. If this sort of a thing were to come to a halt, it must be brought home to people like the accused that they will not be allowed to go to feasts where people are enjoying themselves after a day's hard work and butcher them with knives. It must be made abundantly clear to the accused and people of his mind that the carrying of knives is out of question when they decide to go and mix with other people at the feasts.

I am aware that the accused is a relatively young man who still has many years to live. He has not been to gaol before and in all probabilities still entertains the fear that going to that place will not be a very pleasant experience. That fear will no doubt serve to guide him against mischief. One of the undesirabilities of sending a young first offender like the accused to prison is that sooner or later he will realise that our prisons are not such bad places. They are not like the

14/ German .....

German concentration camps where people were tortured and ill-treated. We punish people by merely depriving them of their liberty. Once they are within the four walls of the prison, people are given a humane treatment. This may have the effect of destroying whatever fear the accused had of going to gaol so that he starts boasting that gaols are built for people.

I must emphasise to the accused and people of his mind that prisons are not just built for people. One of the cardinal principles behind building prisons is to reform criminals so that they can come out better members of society than when they were sent there. With this objective in mind it is of utmost importance that if and when the need arises to impose a custodial sentence upon a person in the accused's situation the court must allow sufficient time to enable the prison authorities to do their work of reforming the accused efficiently.

In my finding the accused has committed a very bad offence - killing another human being. There is nothing wrong with the law of this land that prevents people from killing others. Even in the Divine Law it is written: "Thou shalt not kill." This court takes a rather dim view of people who do not hesitate to kill others. I have therefore, considered it necessary to sentence the accused to a term of imprisonment. As it has been pointed out earlier, the court has to be careful not to sentence the accused to prison for just a brief period. This can have the disadvantage of enabling the accused to be merely adversely influenced by the heart-hardened prisoners so that he comes out of prison a worse member of society than when he was sent there.

With all these considerations in mind, I have come to the conclusion that appropriate sentence for the accused is that he should go to gaol for eleven (11) years. I accordingly sentence him.

B.K. MOLAI
JUDGE

8th March, 1990

For Crown : Mr. Mokhobo
For Defence : Mr. Mda.