

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

and

NKOPANE PITSO

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola  
on the 23rd day of April, 1990

The accused is charged with the murder of Phenya Pitso on the 26th December, 1986 at Mokhalinyane in the district of Maseru. He has pleaded not guilty.

It is common cause that the deceased Phenya Pitso, died as a result of injuries inflicted upon him by the accused. The cause of death was exsanguination into pericardium and left chest following a stab wound through the right ventricle. According to the post-mortem examination report the deceased had two stab wounds.

The first wound was on the left chest and was 1 cm long; the second one was a 3 cm x 2 cm wound on the abdomen and 3 cm above the umbilicus.

Mathibeli Pitso (P.W.1) is the elder brother of the deceased and headman in his village. He testified that on the morning of the 26th December, 1986 he went to the home of Mohapinyane accompanied by Tlali Ramakau (P.W.3), Mokhele and the deceased. When they returned from Mohapinyane's they headed for his home because he had invited the men to his home so that they could eat some meat together. On arrival at his home the men went to the cattle kraal while he went into the house to bring the meat. The meat was in a big basin but there was no knife. He brought the meat and put the basin down near the kraal. The accused had a knife and started cutting the meat into small pieces, but instead of cutting all the meat into small pieces so that the other men could eat, he ate the pieces as he cut them. The deceased ordered him to cut all the meat so that they could also eat.

Mathibeli says that in reply to that order the accused said: "You are very silly, you think it is your son whom you have made a bull at your place. You are very naughty." The deceased did not say anything but stared at the accused. He (Mathibeli) went to the deceased and asked him to forget the matter and not to look at his brother in that way. The accused came but Mathibeli says that he tried to stop him from coming close to the deceased. However the accused stretched his arm and hit the deceased twice

on the belly above the diaphragm. Tlali exclaimed that the accused was stabbing the deceased with a knife. He (Mathibeli) had not seen the knife. The deceased walked some distance and fell down near the kraal. He went to him and found that he had two wounds on the belly. At that time the accused was brandishing a knife. He went to the accused and caught hold of him while Tlali took the knife from him.

Before the incident in question the deceased and the accused got along well and never had any quarrels.

In cross-examination Mathibeli denied that he and the other men assaulted the accused before he stabbed the deceased. He denied that the knife in question was supplied with the meat. He did not see that the accused was bleeding after the fight. He did not see that the accused had sustained any injury before he was handed over to the police that evening.

The evidence of Trooper Lehloba (P.W.2) who arrived at the scene of the crime at about 6.30 p.m. on the same day, was to the effect that on his arrival there the deceased was already dead. He examined the dead body and found two wounds on the belly. The accused was shown to him as the perpetrator of the crime and he arrested him and charged him with murder. An okipa knife was given to him by Mathibeli and the accused said it was his knife and that he had used it to stab the deceased. (He handed in the knife as an exhibit and it was marked e Exhibit 1). He says that

the accused had no injuries but he saw blood on the sleeve of the shirt of the accused but assumed that it came from the deceased.

The evidence of Tlali Ramakau (P.W.3) is the same with that of Mathibeli on all material points. His version is that the accused arrived at the kraal after they had realised that none of them had a knife. On his arrival he cut the meat and ate. The deceased ordered him to cut the meat into small pieces so that they could all eat. The accused said: "You think that I am that child of yours you have made a bull in your house." The accused left the basin and came to the deceased. He stabbed him twice on the belly. He (Tlali) exclaimed that the accused had stabbed the deceased with a knife. Some men tried to take the knife from him but he fought with them till they finally overpowered him and threw him to the ground. They took Exhibit 1 and gave it to Mathibeli. His hands were fastened with a rope till the police arrived. He was handed over to them together with Exhibit 1.

Tlali denied that the accused was assaulted before he stabbed the deceased nor that he sustained any injuries.

Mosito Pitso (P.W.4) is the elder brother of the deceased. He deposed that on the day in question he was at his home when an alarm was raised at the kraal. He rushed to the kraal and found that the deceased had fallen down and was already dead. At that time the accused was throwing himself on the rocks below the cliffs

He says that he helped in the fastening of the hands of the accused but at the same time he says he did not see any blood on the accused because he was far from him - about twelve paces.

In cross-examination Mosito denied that at the preparatory examination he said when he arrived he found that the accused was bleeding and wounded. He asserts that he never went near the accused. In my view this witness is a liar of the first order in that he said he helped the other men in fastening the accused but in the same breath he says the accused was far from him and he did not even go near him.

The above conflicting statements are not the only ones in which Mosito told a lie. In cross-examination by the accused at the preparatory examination he admitted that when he arrived at the kraal he examined the accused and found that he was wounded and bleeding. I have no doubt that the witness made that statement at the preparatory examination and that he is deliberately retracting from it for reasons best known to himself.

The accused gave evidence in his defence and told the Court that when he arrived at the kraal he found Mathibeli, the deceased and Mosito. There was a big basin which had meat and a knife in it. He greeted the deceased because he had not met him since he (deceased) came home for the christmas holidays. Instead of answering the greeting the deceased spoke to Mosito and said: "Mosito, when will this (hona) fetch its wife? (in Sesotho: Mosito, hona ho tla lapa mosali oa hona neng?). He asked the deceased why he referred to him

as "this" (hona). The deceased did not answer the question but attached him and hit him with fists. While he was warding off the blows Mathibeli prodded him with a stick on the back and when he turned to see what was happening, he struck him on the forehead with a stick. When he fell down Mathibeli and the deceased belaboured him with sticks and kicked him. He fought with them for a long time but failed to defend himself properly because he could not see his assailants properly due to the blood that was pouring down his face from the wound he sustained when Mathibeli struck him.

He tried to run away but bumped against the kraal. He wiped the blood from his eyes and saw the knife in the basin. He took the knife and stabbed the deceased who was near him at that time. He is sure that he stabbed him three times. Mathibeli hit him on the back and tried to take the knife from him. They struggled till the knife cut him (accused) on the hand. He managed to wrest the knife from Mathibeli and when the deceased came to him he stabbed him again. They stopped fighting because they were all tired.

The accused said that it was Tlali Ramakau (P.W.3) who uttered the words about his son being made a bull at his house. At the same time the accused says that Tlali was not there at all at the kraal. He is quite sure that he stabbed the deceased six times. He says that he told the policeman who arrested him that his arm had been fractured and that the policeman saw the blood and wounds on his left hand. He reported these injuries at Queen Elizabeth II Hospital.

On the 11th August, 1989 and at the request of Mr. Seotsanyana, counsel for the accused, I made an order that the accused be medically examined to determine if he had any old scars on the forehead and that such examination should include X - ray of both hands in the region of the wrists and the forearm. According to the medical report and X-ray films the accused had no old fractures nor any scars showing old injuries.

I have already formed the opinion that Mosito Pitso is a liar and that his evidence must be rejected in toto. What he said at the preparatory examination that the accused was wounded and bleeding cannot be true. The doctor who examined him at the request of the defence has found no trace of any injury. If he had sustained a fracture on the forearm, the doctor would have seen the old fracture in the X-ray film. No such healed fracture was found. No scar was found on the forehead.

In addition to this there is the evidence of three Crown witnesses i.e. P.W.1, P.W.2 and P.W.4 that the accused had no wounds. I have believed their evidence on this point. There was no evidence that before this incident there was any animosity between the accused and the Crown witnesses. They impressed me as being truthful witnesses. I agree with the defence counsel that there are some discrepancies in the evidence of the Crown witnesses but I am of the opinion that they are minor ones.

Mr. Seotsanyana attempted to criticise the evidence of the doctor who examined the accused at the request of the defence on the ground that the healed fractures were clearly visible from the

X-rays. I do not think that he is entitled to do so without having applied that the witness be declared as a hostile witness. In any case I examined the X-rays and saw no healed fracture. I have seen healed fractures in previous cases and the new formation of the bone around the fracture is usually clearly visible even to the eye of a layman.

Mr. Seotsanyana submitted that there was evidence of bad blood between the accused and his brothers because ever since he was arrested and remanded into custody they never visited him at the prison. In my view the hatred may have come about after the killing of the deceased. The accused killed his brother without any justifiable cause and the natural reaction from the other brothers is to disown him and to have no association or dealings with him.

The accused has obviously told the Court a lie when he said he is quite sure that he stabbed the deceased six times. All the Crown witnesses including Dr. Titi Mohapi who performed the post-mortem examination agree that there were two stab wounds. These two wounds were inflicted by the accused when the Crown witnesses saw him hit the deceased on the belly. Immediately after the hitting the deceased fell down and the two wounds were found.

I have accepted the Crown evidence that the accused got offended when the deceased ordered him to cut the meat into small pieces so that they could all eat. He apparently already had a



grudge against the deceased for some other reason which he has not disclosed to the Court. The request or order made by the deceased to the accused was not provocative.

The accused stabbed the deceased on very delicate part of the body and must have foreseen that his act was likely to cause the death of the deceased but was reckless as to whether death resulted or not. He is not telling the truth that when he stabbed the deceased his face was covered with blood and that he did not see where he stabbed him. The evidence of the Crown witnesses, which I have believed, shows that there was no blood on his face. The question put to P.W.3 by Mr. Seotsanyana (if I recorded it correctly) seems to suggest that the accused was assaulted by the Crown witnesses after he had stabbed the deceased. It reads as follows:

"Q. Accused says he was grabbed after the stabbing, he says the group fought him and hit him with sticks and broke his arms and caused a big wound on the head? - I deny that. He had no wounds, Mosito Pitso was not telling the truth."

If the suggestion is that the accused was assaulted after he stabbed the deceased, he cannot plead that he was defending himself. At the relevant time when he stabbed the deceased his life was not in any imminent danger because the deceased merely stared at him. There was nothing to show that he was about to attack him. It was the accused who went to the deceased and stabbed him.

In the result I find the accused guilty of murder.

My assessors agree.

*J.L. Kheola*  
J.L. KHEOLA  
JUDGE

23rd April, 1990.

EXTENUATING CIRCUMSTANCES

I have found that the accused's intention in the commission of this offence is one known as dolus eventualis. In R. v. Sigwahla, 1967 (4) S.A. 566 at p. 571 the Appellate Division held that

"(a) Trial courts, in their conspectus of possible extenuating circumstances, should not overlook the fact (if it be such) that it is case of dolus eventualis."

I have also found that the accused was under the influence of liquor (R. v. Ndhlovu (2), 1965 (4) S.A. 692 at pp. 695 C - E, 696 A - B).

I have found that there was no premeditation. In Rex v. Taylor, 1949 (4) S.A. 702 at 705 Schreiner, J.A. said:

"If a killing is intentional it is none the less murder because the intention has only been formed immediately before or at the time of the act, though the time factor may be of crucial importance where questions of provocation or self-defence are raised and be relevant to the issue of extenuating circumstances."

I found that there are extenuating circumstances.

SENTENCE: Five (5) years' imprisonment.

  
J.L. KHEOLA

JUDGE

23rd April, 1990.

For Crown - Miss Moruphoane  
For Defence - Mr. Seotsanyana.