

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

MAKALO SELIALIA
MOKOTO MOLUOLLO
MOEKO RAMONE

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 30th day of April, 1990.

The accused stand charged in counts I and II with the murders of Thabo Ramoholi and Pitso Chaletse respectively. The murders are alleged to have taken place on 5th September 1986 at Ha Mohale in the district of Mokhotlong.

The accused are further charged with assault with intent to do grievous bodily harm to Mokhele Doma in count III, to 'Mahlomo Yengane in count IV to Teboho Doma in count V, to 'Mateboho Ramoholi in count VI, to Tlala Ramoholi in count VII, to Mohatane Moabi in count VIII, to Makafane Doma in count IX and to Khahliso Ntho in count X.

They pleaded not guilty to all the above counts.

/However

However during the course of the proceedings the accused were acquitted and discharged in respect of counts VII and X respectively.

The depositions at the preparatory examination were admitted in respect of

P.W.12 Shadrac Yengane

P.W.13 Filoane Ramokheseng

P.W.14 Joshua Ramoholi

P.W.15 Thabo Chaletse

and P.W.17 Dr Iselborn including the post mortem reports relating to deceased 1 Thabo Ramoholi and deceased 2 Pitso Chaletse.

The P.E. depositions of P.W.18 Dr Kanusah were also admitted in regard to his examination of

P.W.4 'Mateboho Doma

P.W.5 Teboho Doma

P.W.6 Mokhele Doma

P.W.8 Makafane Doma

P.W.11 'Maseala Mohale

and P.W.19 Sekholomi Ramone.

The events which occurred on 5th September 1986 resulting in the deaths of deceased 1 and 2 and the assaults on several complainants shown above took place at the home of P.W.1 'Madlomo Yengane where there was a stockfair at which both Sesotho beer and canned beer were sold together with light meals.

The atmosphere was rendered even the more festive by the playing of music to which the participants were dancing in P.W.1's big rondavel. The source of the music was deceased 1's space-gram. Three lights consisting of a glass lamp placed on the table in the centre and two candles placed at strategic points in the rondavel wall generated a sense of well-being and supplied enough means by which activities in there and actors could easily be identified.

/It

It was during the course of the enjoyment deep into the night that a complaint was lodged by accused 3 to P.W.4 'Mateboho (the stock-fair - Chairlady) about P.W.2 Tlala who it was alleged had been insulting accused 3 and others calling them women thus provoking the disturbance of the peaceful atmosphere prevailing in there.

Even though P.W.2 denied ever insulting accused 3 or anybody and even though P.W.4 never heard P.W.2 insult anyone she nonetheless reprimanded P.W.2 and warned him to go and sit next to his brother deceased 1. P.W.2 deferred without protest to the instruction from the chair.

It was when deceased 1 was tinkering at his space-gram and facing towards the wall and away from accused 1 that the latter dealt him a heavy blow at the back of his head with a stick with the result that he fell to the floor. No sooner had deceased 1 tried to rise than accused 2 hit him again on the head and was joined by accused 1 and 3 in the assault of this deceased who then lay prostrate on the floor.

In the fracas that ensued some people betook themselves under the tables and chairs while all lights went out.

According to P.W.6 Mokhele Doma accused 3 lit his torch and he was able to identify him by the red skipper which this accused was wearing. The three accused then made for deceased 2. Accused 2 then levelled a blow with his stick at deceased 2 and fell him to the ground. Deceased 2 tried to rise but was belaboured by the three accused.

P.W.6 tried to take a look but was dealt such a severe blow on the head by accused 1 that he passed out and only came to several hours afterwards in the morning after sunrise.

The crown witnesses are adamant that none of the deceased was armed with anything when they were being

/assaulted

assaulted by the three accused.

When pointed out to P.W.6 that in the court below he said it was accused 3 and not accused 2 who struck accused 1 after the latter had been struck and floored by accused 1 he said accused 1 struck deceased 1 followed by accused 2.

P.W.6 also said that deceased 2 was first struck by accused 3. When told that at P.E. he had said when the accused were through with deceased 1 they made for deceased 2 who was hit by accused 1 he explained that he might have made a mistake but the truth is according to him, that accused 3 struck deceased 2.

It appears that earlier in the evening accused 1 had had some quarrel with P.W.5 Teboho Doma in the rondavel. It appears noone else besides deceased 1 and P.W.2 Tlala was present when accused 1 demanded of P.W.5 a stick which had been handed to him some two weeks previously for decoration with fused wire by P.W.5. Then accused 1 hit P.W.5 with a stick and felled him to the ground. Thereafter P.W.5 left for his home and did not witness any of the subsequent events. He went to see a doctor the following morning. It was suggested to P.W.5 that he was thus hit for he had called accused 1 a rag. He denied this.

P.W.8 Makafane Doma lends support to the evidence of P.W.6 to the extent that deceased 1 was not doing anything hostile to any of the accused when accused 1 hit and felled him to the ground. Further that the two other accused joined in the assault.

P.W.8 further testified that P.W.4 'Mateboho inquired what the accused were doing belabouring deceased 1, and the accused stopped assaulting him. But accused 1 assaulted P.W.4. P.W.8 then heard one of the accused say "Don't hit that one for she is my mother-in-law." Accused 1 heeded that remark.

When the torch had been lit by accused 3 P.W.8 sustained a stick blow to the right jaw delivered by

/accused 1

accused 1. P.W.8 sought refuge under the table.

P.W.2 Tlala Ramoholi said that he was called by P.W.4 and reprimanded following a complaint that he had been insulting accused 3 calling him and others women.

Then he saw accused 1 hit P.W.5 on the head and fall him to the ground. He didn't know why accused 1 did that. Accused 1 was next to the door when this happened. P.W.5 was hit again when he tried to rise. However he managed to go outside. Nobody tried to intervene when this happened. In fact it is not clear according to P.W.5 whether besides the deceased and he there was anybody else in there. First P.W.5 said there was no one. Later he said there were people who were seated by the rondavel wall.

P.W.2 said that he saw the accused hitting another person. Then deceased 1 inquired if the accused were fighting or not. Whereupon accused 1 answered that they were not fighting except that there was that boy Mokotsolane. Then deceased 1 turned to attend to his space-gram. There and then and while facing away from accused 1 the latter hit him with a timber stick and felled him. Accused 3 then joined in the assault. P.W.2 pulled deceased 1 under the table and rested the deceased's head on his lap under that table. Accused 2 also joined in the belabouring of deceased 1 while the latter's head was on P.W.2's lap.

Then deceased 2 inquired
"What are you doing. Do you realise you have injured him."
Thereupon accused 3 said to deceased 2
"Your mother said I would grow under the soil like a potato."
Saying these words accused 3 struck deceased 2 on the head with a stick.

P.W.2 said that the three of the accused then belaboured deceased 2 like a dog that is being killed. He said lights went out when deceased 2 was being assaulted.

/Then

Then accused 3 was using a torch to light up people for purposes of identifying those destined to be assaulted. One of those was Makafane whom P.W.2 saw being lit up and there and then being assaulted. P.W.2 and other crown witnesses said the accused did not appear drunk when they engaged in this vicious assault almost on anyone that their fancy was directed to.

P.W.2 was honest enough to tell the court that none of the accused assaulted him. It is the measure of his honesty that although he testified that the accused assaulted his brother deceased 1 to death he did not seek to have his own back by incriminating them falsely that he also had suffered any beating at the hands of the accused or of anyone of them.

P.W.2 said he never saw deceased 2 hit accused 1 on the head with a stick. He said he only saw when accused 3 hit deceased 2.

In response to the suggestion that accused 3 hit deceased 2 after deceased 2 had hit accused 1 P.W.2 said he never saw that. Though conceding there was commotion in that rondavel P.W.2 did not concede that it was possible that the suggestion put to him was valid.

It is however hard to accept P.W.2's story in preference to that of P.W.8 Makafane Doma when it was put to P.W.2 that he (P.W.8) said he was hit not by accused 3 but by accused 1.

P.W.2 said he did not know anybody by the name of Mokotsolane.

P.W.3 Mahatane Moabi told the court that he was hit by accused 1 when he tried to intervene on behalf of deceased 1 after the fashion of P.W.4.

To the suggestion that deceased 1 made for his stick after he had inquired if the accused were fighting and was replied to by accused 1 who introduced the Mokotsolane factor

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into the events, P.W.3 said deceased 1 was not having or holding any stick. He denied that accused 1 hit deceased 1 in self-defence. P.W.3 was adamant that accused 2 and accused 3 belaboured deceased 1 even if 'Madlomo said she did not see them do so. But it should be remembered that she testified that she kept on covering and uncovering her face with her shawl during the commotion. She also said she did not see Mokotsolane there.

Medical evidence with regard to injuries sustained by the deceased shows that in both instances severe force was applied in inflicting injuries which led to the deaths of both deceased.

In respect of deceased 1 death is said to have been due to general haemorrhage. The skull was fractured and there was subdural bleeding into the brain.

Regard being had to the area of the injuries and the nature of weapons used the crown submitted that the accused had the requisite intent for the crime of murder. The crown conceded that the accused had taken drink but the witnesses for the crown testified that the accused did not appear drunk. In fact accused 1 said he was still fresh and none of the accused suggested that he was so drunk as not to appreciate consequences of his acts or what he was doing. Moreover they were so discerning that accused 2 realised that he should intervene in favour of his mother-in-law 'Mateboho when she was being assaulted by accused 1 who likewise heeded accused 2's intervention.

As for accused 3 it appears he devised a useful strategy for purposes of enabling his colleagues to identify their victims in that he lit up the victims for the purpose. A device which on all accounts involves exercise of a discreet and discerning mind, thus not so beclouded by alcohol as not to render him criminally liable as an active participant in the unlawful assaults which took place after the lights had gone out.

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The accused tried to raise the defence of self-defence but I fail to understand how in the light of uncontroverted evidence that from the start of the assaults they were next to the door actually standing in such a way as to impede the exit of the occupants of that rondavel they did not go out first.

I also fail to understand how accused 1 in the light of the fact that credible evidence shows that when he hit deceased 1 the latter was facing away from him, could be heard to say that he hit him in self-defence. Moreover credible evidence shows that deceased 1 was not armed at all. Equally the version of accused 2 that he struck deceased 1 in defence of accused 1 cannot pass muster because clear evidence shows that when he attempted to rise from the insidious blow dealt him by accused 1 deceased 1 was not armed. Thus I reject as palpably false the version that deceased 1 posed any danger at all to any of the accused for he was unarmed.

The fact that all the accused decided to give false evidence in this aspect of the matter has the effect of strengthening the version advanced on behalf of the crown that three of them joined in the assault on deceased 1.

The fact that any of the accused was assaulted by the spurious Mokotsolane did not entitle them to assault deceased 2 who merely asked the accused if they did not see that they had injured deceased 1.

It seems that accused 3 had harboured a grudge against deceased 2 because deceased 2's mother is alleged to have said accused 3 would grow in the soil like a potato. Asked what accused 3 understood these words to mean he said he did not know. Surely if he felt they implied that he would come to some harm, he shouldn't have had any difficulty in saying it. So clearly he apprehended no danger that these words could possibly convey or entail.

Accused 3's attempt at explaining away his act by saying in trying to defend accused 1 against deceased 2 he

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hit him only once is given a lie to by the medical evidence showing that deceased 2 suffered more injuries than could have been inflicted by just one blow.

D.W.4 Ntho's evidence was a useless tissue of lies.

The version given by the accused in these proceedings is inconsistent with their sworn testimony in respect of their applications for bail. In this Court accused 3 sought to say he was arrested in respect of the assault on deceased 2 yet in his application for bail in 1986 he swore that he was arrested in respect of the assaults on both deceased 1 and deceased 2.

Accused 2 when applying for bail said he joined in the fight. But in this Court he said he did not join in the fight.

Accused 2 said after he was hit he passed out and when he came to he inquired who had hit him and accused 1 told him he was hit by Mokotsolane.

But earlier before the court adjourned on the previous Friday when asked if he inquired who had hit him he said he did not know who had hit him hence his failure to take any steps. Yet now that he has sought to invoke the identity of the spurious Mokotsolane he still didn't proceed against him. Accused 2 has manifested lack of candour in this Court. He appears not to have appreciated that evidence he gave before this Court in his application is good enough for the court to have resort to in testing his credibility.

Likewise it had been suggested to crown witnesses that accused 1 would say that deceased 2 hit him that's why he hit deceased 2. But in his evidence in chief accused 1 did not back up this premised version.

Accused 1 denied assaulting 'Madlomo yet his counsel said he would explain that he hit her because she was holding him so as to enable deceased 1 to hit him.

In fact to his rare credit accused 1 acknowledged that he did not tell the court that deceased 2 hit him on the head.

But immediately this acknowledgement was followed by a legitimate question, namely:

"It is strange that you did not tell this to the court yet you were acting in self-defence when you hit deceased 2?"

Accused 1 said

"I never hit Pitso (i.e. deceased)".

"This was an important issue that you couldn't have forgotten. Your counsel further said you hit Pitso -?"

I never hit him."

In this connection page 23 of my notes shows that defence counsel put to P.W.1 Madlomo

"You saw deceased 2 hit accused 1 on the head -?"

No.

Accused 1 says deceased 2 hit him on the head -?"

I did not see."

It was submitted on behalf of the crown that the accused in meting out the assaults on the victims in the rondavel were acting in concert. It was argued for the accused that there was no proof that in fact they acted in concert for common purpose has not been established.

But in my view there is ample authority in R. vs Swakala and Another 1976 LLR. at 221, that agreement to commit a crime may arise on impulse and without prior consultation.

It stands to reason therefore that it is not unheard of that the accused acting on the spur of the moment can be said to have formed common purpose preceded by no prior consultation among themselves.

The suggestion that accused 3 only lit his torch for

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the purpose of picking up his way out of the rondavel cannot stand in the face of credible evidence that after the assaults he and his companions were pacing up and down in a fighting mood thus giving additional chill to the occupants of that rondavel and those who had covered under the table and chairs.

However after some time the accused left and the lights were put on by P.W.4. Attempts to make deceased 1 speak were to no avail. It was later learnt that day that he died at hospital. Deceased 2 died a day or two afterwards.

I have no doubt in my mind that the crown has discharged the onus cast upon it. I accordingly find accused 1 guilty on all counts except counts VII and X. Accused 3 found guilty in all counts except counts V, VII and X.

Bearing in mind that incontrovertible evidence shows that accused 2 warned accused 1 not to assault P.W.4 'Mateboho Doma who is accused 2's mother-in-law, it seems proper to accept that accused 2 did not associate himself with the assault on that complainant, therefore the charge of assault with intent to do her grievous bodily harm has not been proved against him. He is accordingly found not guilty on count VI. Otherwise with regard to the other counts he is found guilty in all of them except counts V, VII and X.



J U D G E.

30th April, 1990.

ON EXTENUATING CIRCUMSTANCES

In considering the question of extenuating circumstances counsel for defence invited the court to have regard to the legal position that the onus of proving these is on the defence on a balance of probabilities.

In this regard he urged the court to have consideration of factors which are not too remote but which have a bearing on the moral blameworthiness of the accused bearing in mind that the test to be applied is a subjective one.

He accordingly submitted that it is common cause that on the day in question the accused had taken liquor for a protracted length of time, to wit, from around the mid-afternoon of that day till around midnight.

He further invited the court to take into account the absence of premeditation. The effect of the absence of premeditation was highlighted in CRI/T/42/88 Rex vs Machabe Mopala (unreported) by Malini J.

He also urged on the court to have regard to the existence of provocation in the subjective sense.

While on the one hand Mr Foete deferred to the finding made by the court in the main trial he nonetheless on the other hand submitted that it is common cause that accused 2 was struck on the mouth by whosoever did so, be it Mokotswana or someone else. Having thus stated he appealed to the court to take judicial notice of the fact that drunken people are usually touchy and inclined to take exception to matters which they would otherwise ignore when sober.

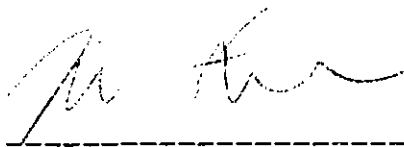
He very rightly pointed out that in their misguided sense of grievance they embarked on these assaults in a misguided belief that they were acting in self-defence.

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He urged the court therefore to apply its mind subjectively in coming to the view that if deceased 2 struck accused 1 in full view of his cousin the latter out of a sense of loyalty to accused 1 would be morally obliged to come to his defence. He urged the court to accept therefore on a balance of probabilities that deceased 2 had struck accused 1.

I have taken all these submissions into account and having scrutinised them both individually and collectively have come to the view that even if when taken singly they would not benefit the accused, however their cumulative effect should help palliate their offence and thereby deflect the imposition of the ultimate penalty.

I accordingly find that extenuating circumstances do exist in this case.



J U D G E.

1st May, 1990.

ON MITIGATION

The court has heard submissions in mitigation. It is stated that the accused are young persons ranging in age between 25 and 26 years. They were drunk that day and are of unsophisticated background. The crimes committed were not premeditated.

In considering sentence the court is to ensure that punishment should meet both the offence committed and the interests of the society.

Counsel for the accused submitted that theirs can best be described as drunken recklessness as opposed to manifestation of malicious intent to take away lives.

I would be failing in my duty if in considering the interests of the accused I should discard those of society.

It has been said that stockfairs are here to stay and long punishments imposed in respect of offences committed on such occasions tend not to serve any meaningful purpose.

However it is owed to the society that if imprisonment can serve as means of protecting its members from wanton extermination by drunkards then the longer the drunkards are kept away from the society the better.

I have taken into account the various degrees of participation by the individual accused in the offences of which they have been convicted. Fortunately for the accused it appears the offences were committed before the coming into effect of the prescribed minimum sentences.

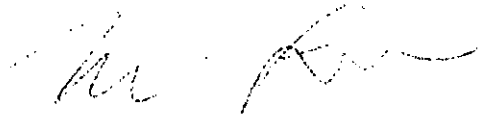
Accordingly, accused 1, 2 and 3 on count III are each sentenced to 2 years' imprisonment. On count IV accused 1 and 3 are each sentenced to 1 year's imprisonment. On count V only accused 1 is sentenced to 1 year's

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imprisonment. On count VI accused 1, 2 and 3 are sentenced to 1 year's imprisonment each. On count VIII accused 1, 2 and 3 are sentenced to 1 year's imprisonment each. On count IX accused 1 is sentenced to 3 years' imprisonment; while accused 2 and 3 are sentenced each to 2 years' imprisonment.

In respect of the murders, on count 1 accused 1 is sentenced to 13 years' imprisonment while accused 2 and 3 are sentenced to 10 years' imprisonment each. On count II accused 1 is sentenced to 11 years' imprisonment, while accused 2 is sentenced to 9 years' imprisonment and accused 3 is sentenced to 12 years' imprisonment.

Sentences will run concurrently.



J U D G E.

1st May, 1990.

For Crown : Miss Nku
For Defence : Mr Peete.