

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

MAKHOOA NAPO

Held at Qacha's Nek

J U D G M E N T

Delivered by the Hon. Mr Justice M.L. Lehohla  
on the 10th day of May, 1990.

The accused Makhooa Napo was jointly charged with accused 2 Mapota Napo (since deceased) with the murder of Tlhahali Pheello Khobise who succumbed on 3rd May 1988 to stab wounds and injuries caused by a stick and a two foot long dart wielded by the accused and his late father respectively.

The defence admitted the Preparatory Examination depositions of :-

P.W.3 Makume Kholise  
P.W.4 Mahasele Kholise  
P.W.5 Police Woman Shata  
P.W.6 Dr. Nolting  
P.W.7 L/Sgt. Ntlhola and  
P.W.9 Moilola Mokhesi.

/These

These admissions were recorded on tape as part of evidence in these proceedings after the crown accepted them.

The additional evidence of P.W.10 Detective Sergeant Thakalekoala was led by the crown and admitted by the defence. Its only importance is that the accused before court was properly cautioned, charged with the offence on trial and arrested.

The admitted evidence of P.W.6 shows that on 5th May 1988 he performed a post mortem examination on the deceased and estimated that death had occurred two days previously.

According to Ex."A" the post-mortem report it is shown that the cause of death was due to

"haemorrhage from the right lung due to stabbing with a thin long object."

On the right upper arm of the deceased P.W.6 observed on "the interior side 3 under wounds 5 cm wide." As to external appearances P.W.6 observed

- (a) the face to be swollen,
- (b) two lacerations on the head,
- (c) 3 very small (5 cm) wounds on the right side of the chest two of which pierced the lungs while three only entered the body cavity.

With regard to the skull P.W.6 observed that it had been fractured at back and had a 5 cm long laceration above the fracture. There was also a 7 cm long laceration towards the front of the head to the middle.

The crown led the oral evidence of P.W.8 Kau Leaoa whose level of intelligence was far in excess of the Std 1 level of education that he said he had reached when he left school in the year that he cannot recall.

He told the court that on the fateful day he had just

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arrived at Pekenene's place where Apostolic church services were in progress but nearing the end when he and fellow church-goers heard a noise of some quarrelling people 100 to 150 paces away.

The congregation rushed to the door and P.W.8 approached the people who were quarrelling and found that they were the deceased who is his cousin and the accused and his father. The spot where the quarrel was going on is at the bus stop.

When he came to them P.W.8 says he took the deceased away when he realised that the quarrel might lead to a fight. The quarrel was centred between the deceased and the accused's father.

Then P.W.8 took away the deceased intending to go along with him to Pekenene's place where P.W.8 had left his luggage.

However the deceased did not reach Pekenene's place because when he and P.W.8 were about to reach the gate to Pekenene's yard the accused's father hurled an insult at him as well as calling to the deceased to come so that the accused's father could kill him. Consequently the deceased made for his challenger.

P.W.8 said he was not in a position to know whether the deceased's intention was to go and engage in a fight with the accused's father or to go and inquire why he was being insulted.

However the description of the scene made by P.W.8 is that the deceased though having approached the accused and his father at a run, however when he was some five paces away from them he was only walking with his stick tucked lengthwise under his left armpit. Then they separated and he took a position between them facing the accused's father.

While in this position the deceased was facing away

/from

from the accused who there and then struck the deceased  
a severe blow with his stick at the back of the  
head and on turning to face the accused with his stick  
still tucked under his armpit the latter struck him  
on the front top part of the head.

I have no doubt that due to the severity of the first  
blow at the back of the head the deceased in turning back  
was responding to mere reflex action. Thus I reject the  
suggestion attempting to cast doubt at P.W.8's testimony  
that a man after being hit would not behave in the manner  
in which P.W.8 described. In the words of P.W.8 his  
observation of the deceased's reaction after the first  
blow is that the deceased seemed to have been reacting  
to a surprise. In other words his behaviour was of a  
man who seemed not to have expected the blow that he  
received. I accept P.W.8's observation as satisfactory.

Then when seeing all this P.W.8 was coming to the  
scene at a brisk pace. Thus when the accused was about  
to deliver the third blow at the deceased who was then  
staggering P.W.8 was able to grab hold of the accused's  
stick and snatch it from his grasp. At the time the accused  
was facing away from P.W.8. There and then the accused  
ran away waited some eight paces away from the scene and  
never took part in the assault any longer.

Then Mapota the accused's father was heard by P.W.8  
to say "come let me finish you off." These words were  
being addressed to the deceased.

P.W.8 saw Mapota stab the deceased three times with  
the dart. He observed that Mapota was stabbing the  
deceased on the upper arm.

The deceased died some thirty minutes after the last  
stab with the dart by Mapota.

P.W.8 says the stick which was held by the deceased  
was a timber stick; while Mapota and his son were holding  
Hlathe sticks. The accused's stick formed part of the

/admitted

admitted evidence and was handed in by P.W.5.

P.W.8 indicated that when struck by the accused on the head the deceased was posing no danger at all to Mapota. In any event from my observation of the evidence led the accused did not say that in hitting the deceased he was acting in defence of his father.

Indeed far from showing how and why he assaulted the deceased he stated that it was not he but his father who had assaulted the deceased with a stick on the head.

Needless to say this version of the accused's story was never put to the witness who testified that he was present throughout the second encounter between the deceased and Mapota and the accused.

In Small vs Smith 1954(3) SA at 434 it is stated as follows :-

"It is, in my opinion elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved."

In the course of giving his evidence the accused stated that the stick his father was using belonged to the deceased. Once again this version of the accused fails on the basis of the authority just cited above.

The accused went further to inform the court that he himself and his father were armed with timber sticks. But it was never put to P.W.8 that he was untruthful in stating that the accused and his father were carrying "hlathe" sticks.

The crown adduced evidence showing that while Mapota was busy stabbing the deceased with the dart the accused

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was standing by and not doing anything to stop the process which he himself had started. The accused on his part stated under oath that he snatched the stick which his father was assaulting the deceased with. Once again P.W.8's evidence which contradicts the accused's version was not put to P.W.8 when the latter was giving evidence on the point. Hence on the authority of Small above accused's version is rejected as a mere fabrication or an afterthought.

I have no doubt in my mind that P.W.8's evidence was impressive and most satisfactory. It was given without any attempt to exaggerate accused's role nor to minimise the role played by the deceased who is P.W.8's cousin.

He was ready to admit the existence of some slight conflict between his evidence at P.E. and his evidence in this Court where he said he only persuaded the deceased to move from the scene by speaking to him whereas at P.E. he had said he pulled him by hand from the scene.

He stood the cross-examination very well. He was not evasive and all his explanations had the ring of truth to them.

In argument and basing herself on the uncontradicted evidence showing that the accused merely stood by when his father was stabbing the deceased Miss Moruthoane for the crown referred me to a passage in S vs Ngobozi 1972(3) SA where Holmes A J said:-

"Suppose A and B, each carrying a knife, form an unlawful common purpose, in the execution whereof each is to play a contributory part, to assault C by stabbing. In the ensuing scuffle, first A gets in the first and only stabbing-blow; and as the result C falls dead.

Each is guilty of murder if he subjectively foresaw the possibility of the execution of their unlawful common purpose causing the death of C, but nevertheless persistent reckless whether the possibility became fact."

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I am in no doubt that the case cited above is on all fours with what we have here.

The accused's testimony has been typified by pitiable untruths. In the middle of his being cross-examined he said he was guilty.

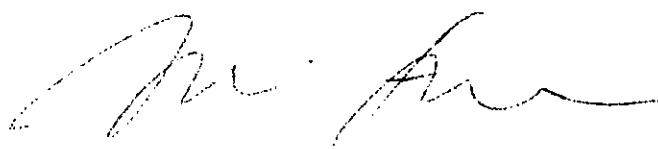
However that is not the end of the matter; for the crown has to prove its case before a verdict of guilty can be returned against the accused by a Court of Law.

In Broadhurst vs Rex 1964 A.C. 441 at 457 Lord Devlin had this to say:

"It is very important that the jury should be carefully directed on the effect of a conclusion, if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty, and accordingly to convict him without more ado. It is the duty of the judge to make it clear to them that this is not so. Save in one respect, a case in which an accused gives untruthful evidence is not different from one in which he gives no evidence at all. In either case the burden remains on the prosecution to prove the guilt of the accused. But if on the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt."

I have considered the admitted evidence and that led before me and have come to the conclusion that the crown has discharged its onus and accordingly find the accused guilty of murder as charged.

My assessors agree.



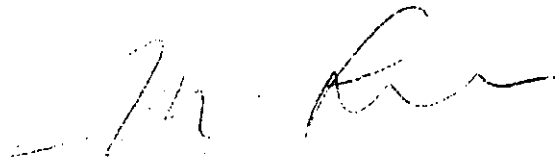
J U D G E.

10th May, 1990.

EXTENUATING CIRCUMSTANCES.

You don't have to address me on extenuating circumstances, this man was playing a minor role, his father had the overwhelming influence on him. Can you tell me about what I have got to consider before imposing sentence?

Well, I have found that there are extenuating circumstances in your case, otherwise you would have had to be sentenced to death for your act. Your counsel has properly or rightly stated that you are a first offender and that this has got to be taken into account in assessing an appropriate sentence to be imposed, and I have heard that you have spent two years in Gaol and that you are a first offender. I was quite impressed with the fact that you have told me the truth by telling me that you are guilty. Well, my assessors and I agree that you be sentenced to 10 years' imprisonment.



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J U D G E.

10th May, 1990.

For Crown : Miss Moruthoane

For Defence : Mr Fosa.