

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

MOLEFI MOHOSHO

Held at Butha-Buthe

J U D G M E N T

Delivered by the Hon. Mr Justice M.L. Lehohla
on the 14th day of June, 1990.

The accused pleaded not guilty to a charge of murder wherein the crown alleged that he is liable for the unlawful and intentional killing of Palama Moro who died on 9th July 1988 at Sekhutloaneng in the district of Berea.

Mr Mohau informed the court that the defence admitted the preparatory examination depositions of :

P.W.2 Phethang Moro
P.W.4 Malefetsane Moro
P.W.5 Fallang Mohosho

/and

and

P.W.7 'Mamolefi Moshosho.

The crown accepted these admissions and they were accordingly read into the recording machine and made part of the proceedings before this Court.

Mr Nthethe who later replaced Mr Mohau admitted the post mortem report marked "A".

Exhibit "A" shows that death resulted from central (sic) failure due to brain oedema and bleeding into spaces of the right side of the brain. With regard to external appearances the doctor who performed the post mortem examination observed 3 huge lacerations on the deceased's head situated on both sides of the head and in its middle accompanied by bleeding through the nose and ears.

The doctor's examination of the skull revealed a huge fracture of the vault and a depression on the right side thereof. The dura was intact but there was observed oedema of the brain and subdural bleeding on the right side thereof.

The admitted evidence of P.W.2 showed that the deceased was his brother. He received a report about the deceased's death and in turn transmitted the report to P.W.4 the chief. P.W.2 was among people who found the deceased's body in a donga near P.W.9 Makhothatso's field.

The admitted evidence of P.W.4 shows that he is the elder brother of the deceased. P.W.1 Daniel Santi and P.W.2 gave him a report about the deceased's absence. In consequence of this report he ordered P.W.1 and 2 to look for the deceased around the place where cattle had been grazing. He later was informed by them that the deceased had died. Thereupon he reported to his senior chief and the police. He later identified the body at

/the

the T.Y. Hospital mortuary before the doctor who performed the post mortem. Thereafter the body was released to him for burial.

The admitted evidence of P.W.5 shows that he is the son of P.W.7. The accused is also P.W.7's son.

P.W.5 went to help in the carting of the maize harvest from P.W.3's field to the latter's home one day in winter. P.W.5 was with Neo Rakeketsi that day. It should be borne in mind that the field referred to as P.W.3's is in fact P.W.9's who is P.W.3's grandmother. Apparently P.W.9 who is alleged to be very old and sickly resigned the management of the affairs relating to her field to P.W.3. But this is not to say P.W.3 had an absolute free hand in this regard; though he would wish the court to believe otherwise. Thus in evidence he vehemently asserted that he is in fact P.W.9 and everything done by P.W.9 is done through him. But credible evidence showed that when P.W.9 entered into an agreement with P.W.7 concerning the carting of the maize harvest from P.W.9's field by P.W.7's scotch cart and span of oxen and the related payment in the form of maize flowers, shoots or tassels P.W.3 was at his place of work at Maputsoe while the agreement was transacted miles and miles away at Mapoteng Ha Bulara.

P.W.5 said that he was present when the agreement was made between his mother and P.W.9. He claimed that the form of payment his mother would receive for carting P.W.9's maize harvest was that his mother's cattle would pasture on the mealie stalks left in P.W.9's field after the harvest. However credible evidence shows that P.W.5's mother would be paid in maize tassels and that in fact she had received her dues.

It is common cause that the deceased and P.W.1 helped in the carting of the maize harvest.

P.W.5 stated at P.E. that he did not know of the agreement between the deceased and P.W.1. However credible

/evidence

evidence shows that P.W.1 was not the deceased's hand maid but had also been employed by P.W.3 for the job. The deceased had been asked by P.W.3 to go help cart part of the maize harvest from P.W.9's field. Thus three scotch carts each belonging to each of the three people namely P.W.7, P.W.1 and the deceased were used to cart the maize harvest from P.W.9's field. It is clear therefore that the accused had neither part nor lot in the carting of the harvest because nobody had invited him to do so between P.W.3 and P.W.9. P.W.5 stated that the deceased pastured his cattle on P.W.9's field on the day in question. Early in the morning of the next day the deceased pastured his cattle there. Then at about 9.00 a.m. the accused left P.W.5 and intimated to him that he was going to expel the deceased's cattle from P.W.9's field.

Apparently the cattle got back to that field because at 9 p.m. the accused left for the field intending to impound the deceased's cattle. P.W.5 and P.W.6 Neo followed him. When he got to the field P.W.5 discovered that the deceased's and P.W.1's cattle were grazing there. When P.W.5 and his companions were busy driving the cattle away stones were thrown at them and they ran away. P.W.5 eventually linked up with P.W.6 but did not know where the accused had run to. P.W.5 said he had not seen the person who had thrown stones at them.

P.W.5 heard a man calling from the donga. He and P.W.6 proceeded there and before reaching the donga they met the accused who was coming from that direction. The accused is said to have been running away. P.W.5 and 6 likewise turned tail and ran away. They didn't ask the accused why he was running away. However they asked him who had been calling out and the accused replied that he had during his fight with the deceased. The accused also indicated that the deceased had run away also.

/P.W.5

P.W.5 indicated also that when proceeding to the field the accused was armed with a stick but when running away from the donga he was no longer having his stick.

P.W.7's admitted evidence is that she had agreed with P.W.9 that she should cart her maize harvest in return for maize flowers from P.W.9's field as well as for having her cattle pasture in that field. P.W.7 intimated this agreement to the accused. The harvest was carted and the operation finished. But P.W.7 was surprised to see the deceased's cart also present to have the harvest carted. She did not know of the arrangement between P.W.9 and the deceased concerning this. She questioned P.W.9 about the many scotch carts and so many cattle and horses in the same field. P.W.9 also revealed her surprise.

P.W.7 said her cattle never went to graze at that field. The deceased's cattle went to graze at that field. The deceased's cattle went to graze there on the harvest day and again the following day which was a Saturday. P.W.7 despite seeing the confusion that had made her uneasy did not go to report to her chief. Thus she and the deceased were not called together before any chief.

That evening she undertook a journey accompanied by P.W.5 and 6 while the accused remained at home. P.W.5 and 6 went back home after P.W.7 had reached her destination. The following day when P.W.7 arrived back home she learnt of the deceased's death.

P.W.1 gave oral evidence in which he told the court that he used to work with the deceased and that on 9th July 1988 he and the deceased were in the veld grazing their cattle whereupon at around 4.00 a.m. the accused, P.W.5 and P.W.6 arrived.

On arrival they said nothing. The deceased was some 12 paces away from P.W.1 when P.W.1 saw these men come to the deceased. He could see the deceased but was attracted

in his direction by the rattling sound of sticks. He then proceeded towards the deceased to find out what was taking place. There and then he observed that there was a fight in which these men were fighting against the deceased. P.W.5 heard P.W.6 say "Molefi shoot". Immediately thereafter P.W.5 heard a gun report. Consequently he and the deceased fled.

Needless to say P.W.8 Detective Trooper Moonyane who conducted an investigation in this matter having treated the question of the firing of the gun with due seriousness set about making investigations to that end but at the end of the day was thoroughly convinced that there had never been any gun in the possession of anybody at that encounter. I have formed a lasting impression of P.W.8's honesty and reliability in his testimony and accordingly accept his evidence in preference to that of P.W.1 on the point. P.W.8 was of the opinion that P.W.1 might have overreacted due to fright. That might be so, except that is no evidence but mere speculation.

However P.W.1's credible evidence shows that the men who had attacked the deceased with sticks followed the deceased as he ran away. P.W.1 also ran away in a different direction from the deceased's.

Mindful of the fact that he had left his cattle behind when he fled P.W.1 stopped on his tracks and went back to the field to collect them. At that time he was able to see the men who had been chasing the deceased. At that time the deceased was not anywhere in sight. The men were across the river. P.W.1 fought shy of them and so did they of him.

P.W.1 while in P.W.2's company eventually found the deceased already dead and lying in a donga next to where the cattle had been grazing. This was after P.W.1 had enkraaled the cattle at home.

Next to the deceased P.W.1 observed broken pieces of different sticks. He also observed a lot of blood near the deceased. P.W.1 knew the deceased's stick a "blue Katlele" stick $1\frac{1}{2}$ metres long, crude and consisting of 5 broken

/pieces.

pieces. There was also a timber stick piece near the deceased.

The rest including the deceased's hat were found further away from the donga at a later stage when police had arrived. P.W.1 did not know to whom the piece of timber stick found there belonged. He didn't know how the accused and the deceased related to each other.

Under cross examination P.W.1 stated that there was bright moonlight that early morning except for thin layer of scattered clouds into which the moon came and went out. Thus he said he was able to identify the people who struck at the deceased with sticks.

Shown that at P.E. P.W.1 said the accused came to the scene in company of P.W.6 and one Ramone and thus did not mention P.W.5 whom he mentioned in this court P.W.1 said that P.W.5 was also there. I can hardly see why P.W.1 was heavily taxed in regard to this discrepancy in the teeth of P.W.5's admitted evidence that P.W.5 was also at the scene.

P.W.1 stated that he knew one Moreare who is his herding boy. He explained that during the carting of corn it never happened that Moreare would remain herding after the cattle which were not in the inspanned team because the carting was effected late in the afternoon when the inspanned cattle were ready to be driven home along with those which were not inspanned. Thus P.W.1 was able to dispose of the falsity of the question that Moreare would surely be looking after the deceased's cattle while the deceased and P.W.1 were carting the harvest home to P.W.9's or 3's.

It was put to P.W.1 that he and the deceased had gone to the veld long before 4.00 a.m. P.W.1 stated that he was able to determined the time they did because he had a watch on.

P.W.1 denied that he had to go to the field with the deceased because P.W.1 had been expelled by the accused the previous Saturday.

/He

He stated that he was not aware that the deceased had pointed out to the accused that there was no point the accused expelling the deceased's cattle from that field for he would nonetheless lead them right there during the night.

He denied the suggestion that he and the deceased and not the herdboys Moreare had to go and graze the cattle there because they were bent on defying the accused. He explained that the deceased took his cattle there for the deceased was to start early in the morning for some place. Thus as his friend the deceased asked that P.W.1 should also go to graze his cattle there early that morning.

It was put to P.W.1 that it was he and the deceased who attacked the accused and his companions who were trying to impound those cattle. P.W.1 denied this and was adamant that the deceased and he were attacked by the accused and his company.

P.W.1 was told that P.W.5's admitted evidence is that the accused and his company were attacked by people looking after cattle at P.W.9's field. He replied that the deceased and he never attacked but were attacked.

The actual portion of the P.E. depositions does not however say specifically that the accused and his company were attacked by people who were looking after cattle in the field in question. It only says

"when we were driving cattle ^{AWAY} stones were thrown at us and we ran away."

The version put to P.W.1 on behalf of the accused was that because the accused could not outrun his pursuer he fought back in self-defence. To this P.W.1 indicated that there is no way he could know about that for he and the deceased ran separate ways.

It was said that the accused's stick broke while he was being chased by the deceased and that they grappled at each other and fell into the donga thus the accused managed to run away. To all these P.W.1 pleaded ignorance for reasons stated above.

/Mr Nthethe's

Mr Nthethe's assumption of the reins characterised by purposeful stimulating and relevant cross-examination was a welcome breeze to the drudgery that typified the previous cross-examiner's unwholesome arrogance accentuated by bouts of long and stubborn silence in response to the courts repeated rulings that he desist from arguing with the Bench and instead put relevant questions to the witness. This manifestation of brazen indifference to the court's rulings and unmitigated lack of Courtliness, calculated no doubt at making the court rue occasions when it made those rulings that proper procedures be followed in the conduct of this case, culminated in the court warning the accused that he should avail himself of services of another counsel as the manner in which his counsel had hitherto comported himself was most unseemly intolerable and totally incompatible with the most elementary canons of good taste. Even when he was aware that the court required his attention as it was addressing itself to him, Mr Mohau defiantly ignored it by making a big show of bending his head to look down on the table in front of him and busily pre-occupying himself with scanning and flipping the pages of his papers thus diverting his attention from the court.

To return to the charge: Mr Nthethe ably put to P.W.1 the accused's case summarised as follows:-

On 9th July 1988 the accused and his companions went to P.W.9's field to impound P.W.1's and other people's cattle. When trying to impound these cattle the deceased and others tried to fight the accused and his companions. P.W.1 and his companions used stones to throw at them and chased them with sticks when the accused and his men fled. These were denied by P.W.1.

During the accused's flight the deceased caught up with him and in the ensuing struggle the accused does not recollect hitting the deceased on the head or anywhere. However after the accused's stick broke he fled once more. But because it was dark the accused was confronted by a donga ahead of him and thus the deceased caught up with him once

/again.

again. The two tumbled and fell into the donga. P.W.1 pleaded ignorance of all these on the grounds that during his and the deceased's flight they followed separate paths.

P.W.1 conceded that the deceased's body was ultimately discovered in the donga. He further pointed out that this donga was about 5 metres deep and muddy at its bed.

P.W.1 further said he did not for reasons advanced a short while ago know that it was at the stage when the accused and the deceased fell into the donga that the accused disentangled himself and ran away.

However P.W.1 even though he did not witness the killing in answer to the question put to him that the accused never killed the deceased said he did.

He conceded that he and the accused responded to the chief's clarion call to go to the donga and see the bewildering event in the donga.

Under re-examination Mr Qhomane for the crown elicited from P.W.1 the fact that contrary to the accused's previous counsel's suggestion that P.W.1 did not see people who had come to P.W.9's field in fact he saw them. P.W.1 further said before the fateful day he already knew the accused and that as there was moonlight which shone alternately as the moon came into and out of the clouds he was able to recognise the accused at the stage when the moon was out of the clouds.

P.W.1 denied that he and the deceased attacked first and went further to say that he personally did not attack anybody nor did he see the deceased attack anybody at all.

In answer to the Court's question why P.W.1 avoided the accused and his men when he later came to collect the cattle he said his reason was that they had earlier chased him and the deceased. He however said he did not know why the accused and his men also avoided him.

P.W.3's evidence shows that the accused was not involved

/in

in the agreement whether to let his mother's cattle graze on the mealie stalks remaining in P.W.9's field or be paid in mealie stalk flowers in return for the carting of maize harvest from P.W.9's field.

P.W.3's evidence indicates that he had been told by the deceased that the accused had expelled the deceased's cattle from that field. When trying to solve the deceased's problem P.W.3 was discouraged by the deceased pointing out that since cattle had already been driven away from the field P.W.3 should not bother calling the accused's mother to account for that.

P.W.8 Detective Trooper Moonyane testified that when he came to the scene in response to the report he received about the deceased's death he found a piece of plastic stick near the deceased's feet. He also found 3 pieces of "blue Katlele" stick near the body together with another piece similar to the plastic piece found next to the deceased's feet. He observed a pool of blood next to the deceased's head.

P.W.8 sought help to lift the deceased's body from the bottom of the donga to the top so that he could examine it. On examination P.W.8 found three open wounds on the deceased's head.

A short distance away from the donga P.W.8 found a piece of timber stick next to which a woolen hat later identified as the deceased's was also found.

P.W.1 took P.W.8 to the field where the deceased and P.W.1 had had their cattle pastured some 143 paces from the donga.

Later P.W.4 presented to P.W.8 the accused and some three others. Having identified himself to them P.W.8 cautioned and arrested them.

Further investigations led P.W.8 to release three other men.

/During

During the course of the investigations P.W.8 said he confronted the accused with pieces of sticks collected from inside the donga and the one from above it. The accused acknowledged these pieces, P.W.8 said.

He further testified that following the accused's explanations P.W.8 took the accused to the latter's home where in the presence of the chief of the place the accused gave P.W.8 a piece of timber stick matching the other which had been collected from above the donga.

The piece of stick was brought to P.W.8 by the accused from a stable.

P.W.8 duly charged the accused with murder.

Mr Nthethe was able to elicit from P.W.8 albeit not before applying various tactics the fact that the accused was kept in police custody beyond the prescribed maximum of 48 hours.

P.W.8 under cross-examination testified that following his investigations he had reasonable suspicion upon arrest that the accused was liable for the crime alleged to have been committed.

He further testified that the explanation given by the accused when producing the piece of stick from the stable is that it was part of his stick which broke during their quarrel with the deceased. Thus the accused explained that he had taken that piece of stick after the fight..

With regard to plastic stick pieces Ex."1" P.W.8 stated under cross-examination that the accused had said one of his companions Neo Rakeketsi P.W.6 had thrown it to him during the fight in the donga with the deceased. He further said P.W.6 confirmed what the accused had said about Ex."1".

P.W.8 denied that he was not truthful in stating the above. He dismissed the accused's alleged version that the accused didn't know anything about Ex."1" and insisted that

/the

the accused had given him an explanation about Ex."1".

P.W.8 was referred to the P.E. depositions of P.W.6 whom the crown chose not to call in the instant proceedings and shown that P.W.6 never said what P.W.8 told this Court about Ex."1". P.W.8 expressed surprise at this.

Asked why he thought P.W.6 never told the magistrate what P.W.8 insists P.W.6 had nonetheless previously intimated to him, P.W.8 said he had learnt that P.W.6 looks after the cattle of the accused's parents.

The evidence of P.W.8 impressed me as truthful. It was the unpretentious mark of its quality that even though he had satisfied the requirements of the statute stipulating that exhibits be given identification marks he conceded he had failed to do so even though a label describing the exhibits presented before this Court was filled by him item by item. It seems to me in saying he had not marked the exhibits P.W.8 thought he was required to leave a mark on each. In this regard it cannot be said he was deliberately lying when he admitted not doing what he in fact had done.

At the end of the crown case the accused exercised his right to remain silent.

In the address to the court Mr Qhomane gave a brief summary of the salient aspects of P.W.1's evidence. He lay emphasis on the fact that P.W.1 was attracted by the sound of sticks to where the deceased was in P.W.9's field. He indicated that P.W.1 saw 4 men attacking the deceased who fled and was pursued by the accused and his colleagues. He invited the court's attention to the fact that the deceased was assaulted by these attackers and that this evidence was not seriously challenged the only semblance of challenge being that the deceased and P.W.1 were the initial aggressors.

Mr Qhomane brought to the court's attention the fact that P.W.6 stated at P.E. that stones were thrown at him and his

/companions

companions without saying who did so. Thus he criticised the defence counsel's basis for putting to P.W.8 that according to P.W.6 the deceased and P.W.1 threw stones at P.W.6 and his colleagues.

It was submitted that the accused did not deny that he and his colleagues went to the place where P.W.1 and the deceased were.

Indeed it is questionable why the accused went, as put to crown witnesses, to P.W.9's field to impound the cattle regard being had to the fact that nothing warranted him to go and impound those cattle because the field did not belong to any of his friends but to people who had authorised the deceased and P.W.1 to graze their cattle there.

It should be borne in mind that the accused's option to silence is his right. The onus remains on the crown to prove its case against him throughout. On the other hand there is a body of authority to indicate as was stated in S. vs Madlala 1962(2) SA. 637 by Holmes J.A. that

"An accused who elects not to give evidence runs a risk and the fact that his failure to give evidence might be due, not to his complicity in the offence charged, but to his complicity in a subsequent or lesser offence, will not enure to his benefit."

In the same vein Hoffman and Zeffertt in South African Law of Evidence 3rd Ed. at 470-1 addressing themselves to the accused's failure to rebut or explain prima facie evidence state as follows:

"An accused's failure to testify can be used as a factor against him ...only when at the end of the case for the State, the State has prima facie discharged the onus that rests on it, it cannot, therefore be used to supply a deficiency in the case for the State, that is to say, where there is no evidence on which a reasonable man could convict.

The situation is rather different when the evidence against the accused is not direct but circumstantial. If the prosecution has proved

/suspicious

suspicious circumstances which the accused, if innocent, could reasonably be expected to answer or explain, his failure to testify will strengthen any unfavourable inferences which can properly be drawn from the prosecution evidence. But this form of reasoning is permissible only when the prosecution case is strong enough to call for an answer. It must be sufficient in itself to justify, in the absence of explanation or answer, the inference of "guilt."

At page 470 the learned authors state:

"Although evidence does not have to be accepted merely because it is uncontradicted, the court is unlikely to reject evidence which the accused himself has chosen not to deny."

Even assuming that there was an act by the deceased calling for self-defence the fact that the injuries described in the admitted medical report show an excessive use of violence against the deceased can hardly stand the accused in good stead.

There was evidence that the accused and his companions were seen attacking the deceased who fled. It would be indeed naive not to infer in such circumstances that because the deceased was outnumbered he was ultimately overpowered by his pursuers.

The accused's own stick was used in the assault. It would be naive not to infer that it broke during the assault owing to the nature of the injuries on the vital part of the deceased's body.

I have considered the authorities referred to me including Rex vs Blom 1939 AD 188 at 202-203 in view of the fact that nobody witnessed the actual killing. But the version put on behalf of the accused shows that the accused's and the deceased's fight ended in a donga where the deceased was later found dead.

The uncontradicted evidence by P.W.8 that Ex."1" was supplied to the accused by P.W.6 to reinforce himself in the fight against the deceased becomes conclusive that the accused gave an explanation to the policeman in circumstances described by that policeman.

/The

The pointing out of the part of the stick to P.W.8 supplied sufficient material on which the court is entitled to infer that this pointing out amounted to the admission of guilt.

On the basis of the evidence before me and the authority of S. vs Mini 1963(3) SA 188 I come to the conclusion that in delivering the blows that he did together with those who might have been acting along with him the accused must have realised that death might ensue and that he nonetheless inflicted injuries sustained regardless of the likely consequences.

The crown has proved that there was motive that prompted the attack on the deceased namely that the accused had earlier expressed his disapproval of the deceased's grazing his cattle in P.W.9's field by expelling them from there. See R vs Mlambo 1957(4) SA 728 at 737 and Hanyane vs Rex C. of A. (CRI) No. 2 of 1983 (unreported) at 8 as to the role played by motive in a case.

I have no doubt that the crown has discharged the onus cast on it. The accused is accordingly found guilty of murder.

My assessors agree.




J U D G E.

14th June, 1990.

EXTENUATING CIRCUMSTANCES

The court finds that the accused was misled by his mother who said her cattle were entitled to graze in P.W.9's field. Accordingly this fact is taken into account as a basis upon which the Court is justified to find that extenuating circumstances exist in this case and it is so ordered.

Sentence:- 10 years' imprisonment.



J U D G E.

14th June, 1990.

For Crown : Mr Qhomane
For Defence : Mr Nthethe.