

CRI/T/30/91IN THE HIGH COURT OF LESOTHO

In the Matter

R E X

v.

BOTHATA MOHOLO

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 5th day of September, 1991.

The accused has pleaded not guilty to a charge of murder on the following allegations:

"In that upon or about the 28th day of January, 1990 and at or near Ha Khitsane in the district of Mophale's Hoek, the said accused, acting unlawfully and with intent to kill, did assault Mpho Mafela and inflict a stick wound upon him from which he (the said Mpho Mafela) died at Queen II hospital on the 30th day of January, 1990."

It may be mentioned from the word go that during the course of this trial Mr. Lenono, who represents the Crown in this matter accepted the admissions made by Mr. Putsoane, the defence counsel, that the depositions of Phethang Meji, Dr. Giyas Ramuddin Shaikh, Sefate Meji and Maafe Motjeleba who were P.W.6, P.W.7, P.W.8 and P.W.11 at the Preparatory Examination proceedings would not be disputed. In terms of the provisions of S.273 of the Criminal

Procedure and Evidence Act, 1981 the depositions of Phethang Maje, Dr. Shaikh, Sefate Meji and Maafe Motjeleba became evidence. It was unnecessary, therefore, to call the deponents as witnesses in this trial.

After the crown had closed its case the court was informed that the accused had decided to remain silent and close his case without giving evidence, or calling any witnesses to testify, in his defence. The court has, therefore, only the crown evidence to rely upon for the decision in this trial.

It is common cause, from the evidence before me, that at about dusk, on 28th January, 1990, the deceased and P.W.3, Mohanuoa Mosakeng, who were, lovers were returning to their home village, Ha Khitsane, from a drinking session at the house of Lebatlamang in the neighbouring village of Dutch Reform. As they approached a donga in the village of Ha Khitsane P.W.3 noticed P.W.4, Paseka Motjeleba, ahead of them and called at him to wait for them. The deceased, who was very drunk, started hurling insults at P.W.4. P.W.3 tried to rebuke the deceased against it but the latter continued to insult P.W.4 by his mother's private parts. When P.W.3 and the deceased eventually caught up with him, P.W.4 who was in fact a cousin of, and older than, the deceased tried to reprimand him but the deceased would not stop it.

According to him, Phethang Meje heard the insults and went to the

spot where he found P.W.3, P.W.4 and the deceased. He confirmed that the deceased was the person using abusive language against P.W.4. At that time the accused was passing by. Phethang Meje then asked the accused to assist him to reprimand the deceased for insulting P.W.4. It was at that time that P.W.3 who was intending to go to her house in the village of Ha Khitsane decided to put up for the night at the home of one of her in-laws in the same village. She, therefore, left the deceased in the company of P.W.4 and Phethang Meje.

It is further common cause that after P.W.3 had left, Tseliso Khitsane came to the scene. When the accused asked him why he was insulting P.W.4 who was older than him the deceased took offence and wanted to fight the accused. The fight was, however, stopped by P.W.4, Phethang and Tseliso. The accused who was clearly offended by the behaviour of the deceased ran to his house. When he returned he was armed with a stick. He wanted to beat up the deceased but he was stopped from doing so by P.W.4, Phethang and Tseliso.

The accused and the deceased were in fact separated. Phethang took the deceased to his parental home where he went to bed in the same house that his (Phethang's) father was sleeping. The accused left with P.W.4, according to whom the former threatened that the relatives of the deceased were going to wear a mourning cloth. However, P.W.4 warned the accused against such threats and advised

that it would be better to report the incident to the parents of the deceased. He (P.W.4) eventually parted with the accused who took the path leading to his house.

In his evidence Sefate Meje testified that he was the father of Phethang. He confirmed that on the night of the day in question Phethang brought to his house the deceased who was very drunk and crying. The deceased was saying he wanted to fight. He did not, however, mention the person he wanted to fight. He told the deceased to get into bed and sleep. Whilst he was sleeping in the same house with the deceased he noticed the door opening and the latter going out. He tried to follow him out but the deceased disappeared in the darkness and could not see him. Sefate Meje then returned into his house and slept.

P.W.5, Seala Seala, testified on oath and told the court that he stayed at the home of P.W.3 who was the wife of his elder brother. At the material time his elder brother was not at home. He was at his place of work in the Republic of South Africa. He (Seala) was, therefore, staying with P.W.3 and her 10 years old child. According to P.W.5 at about 7 a.m. in the morning of 29th January, 1990 he woke up and went out only to find the deceased lying prostrate on the forecourt of his house. He tried to talk to him but the deceased could not speak. He, however, noticed that the deceased had sustained a small bleeding wound on the head. As

P.W.3 was not at home on that day, he went to raise an alarm at the home of a next-door neighbour called Libe and the deceased's mother. When he returned P.W.5 found that many people had gathered at his house. The deceased was then taken into the house which he (P.W.5) used for sleeping.

P.W.3 confirmed that when she returned home in the morning of 29th January, 1990 she found the deceased lying in one of her ouses, injured and speechless. She did not know how the deceased came to be injured at her house.

Eventually the deceased who was still alive was conveyed in a vehicle to Mohale's Hoek hospital. Both P.W.3 and P.W.5 did not accompany the deceased to the hospital.

Tseliso and Maafe confirmed that on the morning of the day in question, 29th January, 1990, they heard the alarm concerning the deceased. They did not, however, go to the home of P.W.3. According to him Maafe Motjeleba had to go to look after animals in the veld. Tseliso advanced no reason why he could not go to the home of P.W.3 in response to the alarm.

In his evidence P.W.4 further told the court that in the morning of 29th January, 1990 he too heard the alarm following which he went to the home of P.W.3 where he found the deceased

lying on the forecourt of P.W.3's house. He confirmed that the deceased had a small bleeding wound on the head and was speechless. According to him P.W.4 he looked for a vehicle with which the deceased was conveyed first to Mohale's Hoek police charge office and then to Mohale's Hoek Government hospital. He actually accompanied the deceased to Mohale's Hoek and the latter sustained no additional injuries whilst he was being transported from Ha Khitsane to Mohale's Hoek hospital. On arrival at Mohale's Hoek hospital the deceased, who was still alive, was immediately transferred to Queen Elizabeth II hospital in Maseru. P.W.4 then returned home and did not accompany the deceased to Maseru. However, he later learned that the deceased had passed away.

P.W.1 D/Tpr Hlaele testified that on 31st January, 1990 he first met the accused when the latter surrendered himself at Mohale's Hoek police charge office. The accused gave him certain explanation following which they proceeded to his (accused's) home at Ha Khitsane. They reported at the chief's place after which they went to the accused's house. This is confirmed by P.W.2, Tsoinyane Mabula, according to whom he was the chief's representative detailed to accompany P.W.1 and the accused to the latter's house.

In their evidence P.W.1 and P.W.2 told the court that at his house the accused produced, from underneath a bed, a stick which he handed to P.W.1. He (P.W.1) took possession of the stick which he

handed in as Exh 1 in this trial. Exhibit 1 was handed to P.W.1 in the presence of his mother who even gave the accused a clean skipper to put on. The accused never complained that he had been illtreated in any manner by the police. Indeed, P.W.1 told the court that he or any other police officers would have no reason to illtreat the accused who had surrendered himself at the charge office and was co-operative with the police.

After he had produced the stick (exh 1) the accused took P.W.1 and P.W.2 to a house which he described as belong to P.W.3. Thereafter P.W.1 returned with the accused to Mohale's Hoek police station where he cautioned and charged him as aforesaid.

On 1st February, 1990 P.W.1 proceeded to the mortuary at Mohale's Hoek hospital where he found the dead body of the deceased. On examining it for injuries he noticed that it had sustained a single open wound on the head.

The evidence of Dr. Shaikh was to the effect that he was the medical doctor who, on 1st February, 1990, performed a post-mortem Examination on the body of a male African Teenager at Mohale's Hoek Government hospital. The body was identified before him as that of the deceased by Maafe Motjeleba and Thabiso Motjeleba. This was confirmed by Maafe Motjeleba who testified that the deceased was his own cousin.

According to the evidence of Dr. Shaikh the external examination revealed that the deceased had sustained a single two centimetre long laceration on the head. The wound had already been stitched. On opening the skull he found that there was extensive subdural haematoma on the left hemisphere of the head. From these findings the medical doctor formed the opinion that a blunt instrument had been used to inflict the injury on the deceased and death was due to the head injury.

In my finding there is ample evidence indicating that the deceased was found with a head injury and speechless on the forecourt of P.W.3's house in the morning of 29th January, 1990. The only important question is whether or not the accused is the person who inflicted the injury on the accused. In this regard it is common cause that on 5th February, 1990 the accused appeared before E.M. Lentsoe, the magistrate, and made a confession to the effect that he was the one who, on the night of 28th January, 1990, went to the house of P.W.3 and hit the deceased a blow on the head with a stick. The admissibility of that confession was challenged. The court then held a trial within a trial to determine the admissibility of that confession. In a separate judgment which was delivered on 21st August, 1991 the court ruled that the confession was admissible. That being so, it must be accepted that the answer to the question I have posted viz. whether or not the accused is

the person who inflicted the head injury on the deceased, must be in the affirmative.

Although the medical doctor who performed the autopsy on the dead body of the deceased testified that the deceased had died as a result of the injury inflicted on his head, it is significant to observe that when he arrived at Mohale's Hoek hospital on 29th January, 1990 and was immediately transferred to Queen Elizabeth II hospital the deceased was still alive. When the post-mortem examination was performed on his dead body in Mohale's Hoek on 2nd February, 1990 the deceased had his head injury sutured thus

indicating that some treatment had been administered to him before he passed away.

There is, however, no evidence as to who administered the treatment? Was the person who administered the treatment qualified to do so? What kind of treatment was it. The absence of such evidence ^{has} /in my finding broken the chain and the possibility that the deceased may have been treated by an unqualified person who administered a wrong treatment thus precipitating the death of the deceased cannot be totally ruled out.

Assuming the correctness of my finding that there is a possibility that the deceased may have died as a result of an

unqualified person administering a wrong treatment, it must be accepted that there may well have been an actus novus interveniens which precipitated the death of the deceased. That being so, the accused cannot properly be held responsible for the death of the deceased.

In the premises, I am satisfied that the accused did assault the deceased and inflict the head injury found on him. I am, however, not convinced that it has been proved beyond a reasonable doubt that the deceased died as a result of the injury caused by the accused. The proper verdict should, therefore, be that the accused is guilty of assault with intent to do grievous bodily harm. He is accordingly convicted.

My assessor agrees with this finding.

SENTENCE

Five (5) years imprisonment of which two (2) years are suspended for 3 years on condition that the accused is not convicted of any offence involving violence on other persons during the period of suspension.


B.K. MOLAI

JUDGE

5th September, 1991.

For Crown: Mr. Lenono,

For Respondent: Mr. Putsoane.