

IN THE HIGH COURT OF LESOTHO

In the matter between:-

R E X

and

MOTSOANE SENAOANA

Accused

HELD AT BUTHA BUTHE

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 12th day of April, 1991

The accused is charged with the murder of 'Mapiti Khumalo on the 9th day of February, 1989 at Ha 'Makuini in the district of Butha Buthe. The defence tendered a plea of guilty of culpable homicide which was rejected by the Crown.

P.W.1 'Mamakoanyane Loki testified that she lives in the same village with the accused. The deceased also lived in the same village. On the 9th February, 1989 she had invited her

co-villagers to assist her to hoe her field. After they had finished hoeing they set down and drank some liquor. The accused and one Mabolloane, arrived and joined in the drinking. Having finished the liquor they went to her home where she gave them more liquor in a twenty - litre tin. The accused drank the liquor with the people who had been hoeing until late at night. The deceased had also joined the group although she had not gone to the fields. P.W.1 asked them to leave because she wanted to sleep. They complied with her request.

Under cross-examination the witness denied that she knew of any relationship between the accused and the deceased.

P.W.2 'Maqenehelo Sepetla testified that on the 9th February, 1989 she had brewed some liquor to celebrate the birthday of her child. The celebrations went on until very late at night. The accused and the deceased attended the celebrations but arrived at night and were already drunk. There were about seven people in the house. They were all drinking liquor and singing. They left one by one until only the accused and the deceased remained. Thereafter the deceased informed P.W.2 that she was leaving. P.W.2 said she should not go because it was too late. The deceased insisted that she was leaving and even asked P.W.2 to lend her a blanket because it was cold. The accused said P.W.2 should let her go because he would accompany her. P.W.2 lent the deceased a blanket and she left with the accused. Some time after they had left she heard their voices at the forecourt of her house. She opened the door and found

them at the forecourt. She again pleaded with the deceased to come into the house because it was too late for her to go to her home. She refused. P.W.2 gave up and went into her house and slept.

After some time the accused knocked at the door and asked P.W.2 to open for him. She refused. The accused said he had brought her parcel and dropped something at the door. She looked through the window and saw that the accused was going away. She opened the door and found the blanket which the deceased had borrowed. She took it and again slept. The accused again returned and knocked at the door and asked P.W.2 to open the door and allow him to come in because she did not know why she had come to her place. On this occasion she opened the door because she was curious and wanted to know why he had brought back the blanket at that time of the night.

The accused entered and sat down. He asked her if she knew that the person with whom he left was dead. He explained that he caught hold of her and choked her and she died. He said he was playing with her. Finally he warned her not to tell anybody because he would turn against her. After that he went away. P.W.2 reported the matter to her mother-in-law immediately after the departure of the accused. On the following morning the deceased was found dead near the aloes near the chief's place.

Under cross-examination P.W.2 denied that she was in love with the accused. She said she did not know any relationship

between the accused and the deceased.

The rest of the depositions of the Crown witnesses at the preparatory examination were admitted by the defence. They relate to the finding of the body of the deceased on the morning of the 10th February, 1989 as well as the injuries it had, the confession made by the accused and the post-mortem examination report which was handed in evidence by agreement without calling the doctor who performed the post-mortem examination.

According to the post-mortem examination report the death of the deceased was due to intracerebral haemorrhage and?? Hanging. Externally the deceased had bruises on forehead (right), left cheek and jaw; Blood was oozing from the mouth, ears and nostrils; the eyes and tongue were protruding; there were pressure marks around the neck. Internally there was linear fracture of the parietal bone and intracerebral haemorrhage. Both lungs were congested.

In the confession the accused states that when he left 'Maqenehelo's place he accompanied the deceased who was his lover. On the way she requested her to accompany her to Sajene's place. He said Sajene's place was too far and he could not reach it. He told her that he just wanted to have sexual intercourse with her. The deceased said they should go on and make preparations later. When they came to the aloes he again asked her to have sexual intercourse with him. She refused. He caught her and threw her to the ground and had sexual intercourse with her. Because she was refusing he strangled her and pressed her to the ground. He then dragged her out of the path and tried to raise her up, he noticed that

she was numb and her neck was loose or unbalanced. He took the blanket she had borrowed from 'Maqenehelo and told her that his lover had died.

At the preparatory examination the accused decided to make a sworn statement after the Crown had closed its case. In that statement he states that he and one Sajene were the lovers of the deceased. She had warned him to respect Sajene because he was her first lover. On the 9th February, 1989 the deceased asked him (accused) to accompany her as Sajene had already left. He agreed. She borrowed a blanket from 'Maqenehelo. On the way he asked the deceased to have sexual intercourse with him. She refused. He threatened her, choked her and she died. He went back to 'Maqenehelo and told her about the matter.

In his testimony before this Court the accused deposed that when they left 'Maqenehelo's place the deceased said she was going to Sajene's place. He did not approve of that and when she insisted that they should go there, he caught her and choked her. She fell down. He also fell down and they both rolled down the slope and over the barbed wire until they landed in a yard. He did not actually intend to strangle her but merely intended to frighten her so that she could stop insisting that they should go to Sajene's place.

In the three statements made by the accused at various time he admits in no uncertain terms that he killed the deceased by strangulating her. The question is whether the killing can be regarded as justifiable homicide. The accused does not say that he

killed the deceased in self-defence. In the confession which he made to a magistrate on the 14th February, 1989 he says he choked the deceased because he was refusing to have sexual intercourse with him. He repeated the same story at the preparatory examination on the 8th November, 1989. However, at the trial he now says that he strangled her because she insisted that they should go to Sajene's place and that he had already heard sexual intercourse when he strangled her. I am of the opinion that the accused is a liar and that in his testimony before this Court he told a pack of lies. The truth is what he said in his confession and in the statement he made at the preparatory examination that he strangled the deceased when she refused to have sexual intercourse with him. He strangled the deceased and forced her to succumb to having sexual intercourse with him. In other words he raped the deceased and in the course of that he strangled her to death.

There was no provocation on the part of the deceased. She was entitled to refuse to have sexual intercourse with the accused even if they were lovers because she was not his wife. I have a very serious doubt that the deceased had any illicit love affair with the accused. The witnesses who gave evidence in this case were not aware of such affair. In addition to that the deceased behaved in a manner which indicates that she was not in love with the accused. The accused had to use very savage force in order to overpower her. This is an indication that she resisted very strongly and struggled with the accused before she was killed. The injuries show clearly that the accused lied when

he said all he did was to hold her at the throat and pressed hard. There were pressure marks around the neck which even gave the doctor impression that the deceased was hanged. Something like a belt or rope must have been used to cause the marks around the neck. There was a fracture of the parietal bone indicating that some hard object must have been used to strike the deceased.

It is common cause that at the time of the commission of the offence alleged against him the accused was drunk. The criminal liability of intoxicated persons is clearly set out in section 2 (1) (2) of the Criminal Liability of Intoxicated Persons Proclamation No. 60 of 1938 as follows:-

- 2(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.
- (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -
 - (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person;
or -
 - (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

The accused in the instant case knew what he was doing and knew that it was wrong. He described very well what he did although he sometimes distorted the facts to suit his purposes. He knew that what he did was wrong and immediately went to 'Maqenehelo and told her what he had done and strongly warned her not to tell any

person that he had killed the deceased. This is a case of voluntary intoxication and the accused was not insane, temporarily or otherwise.

I found that the accused had the specific intent to kill the deceased in that he foresaw the death of the deceased as a possibility due to his assault but was reckless as to whether it occurred or not.

I find him guilty of murder.

My assessors agree.

J.L. KHEOLA
JUDGE

12th April, 1991.

For Crown - Mr. Qhomane
For Defence - Mr. Fosa.

EXTENUATING CIRCUMSTANCES

Extenuating circumstance became obvious during the trial. They are that the accused was drunk and that there was no premeditation. I find that there are extenuating circumstances.

SENTENCE: I took into account that the accused is a first offender; he has four minor children; he was drunk when he committed the offence. However, the accused committed a very serious offence for no apparent reason. I sentence him to seventeen (17) years' imprisonment.

J.L. KHEOLA
JUDGE

12th April, 1991.

For Crown - Mr. Qhomane
For Defence - Mr. Fosa.