

IN THE HIGH COURT OF LESOTHO

In the matter between:-

R E X

and

LEETO RALIBOLU

1st Accused

KHATHATSO RALIBOLU

2nd Accused

MOROBI RALIBOLU

3rd Accused

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 26th day of April, 1991

At the commencement of this trial the Court was informed that one Khothatso Ralibolu who was accused number three at the preparatory examination proceedings had absconded and that despite a very diligent search made for him he could not be found. The Crown Counsel applied for a separation of trials so that the trial of A3 can come at a later stage. For convenience I shall refer to Khothatso Ralibolu as A3.

The accused are charged with murder, it being alleged that upon or about the 26th day of December, 1989 and at or near Kolbere

in the district of Thaba-Tseka, the accused murdered Lefa Motlomelo. They pleaded not guilty.

Mokete Motlomelo (P.W.1) testified that on the 26th December, 1989 he and the deceased went to Kolbere village. They had been sent there by their uncle Tsehla to cut trees with which he intended to build a hut at his cattle-post. On their arrival at Kolbere they found that one Botha from whom they were to get the trees was not in the village. They decided to go to a feast at the home of Lekhooa Tsoloane who was P.W.3 at the preparatory examination (P.E) and whose deposition was admitted in evidence in this Court in terms of section 227 of the Criminal Procedure and Evidence Act 1981. P.W.1 said that when they approached their destination they met A3 who was scolding them and accusing them of trespassing upon his arabie land. Although the deceased denied the accusation A3 struck him once on the head with a "lebetlela" stick. Lekhooa Tsoloane intervened and the fight stopped. The stick used by A3 was fairly thick because it was one and half inches thick and about one yard long.

Thereafter P.W.1 and the deceased went to the feast at Lekhooa's home. While they were there A1 came to them and ordered the deceased to go home. In reply the deceased said A1 had no right to tell him to go home. P.W.1 then asked the deceased that they should go to their home. The deceased agreed. They walked away but when they were behind the house A1 came to them and struck the deceased on the head with a "lebetlela" stick. He struck him

once. P.W.1 attempted to intervene but noticed that there were many people who were attacking them. They ran away but before they did so A2 had struck the deceased on the arms with a stick. When they came home P.W.1 noticed that the deceased had a bruise on the frontal bone and another on the back of the head, there was an abrasion on the waist and a swelling on the left forearm. On the following day the mother of the deceased incised the bruises on the head because the deceased complained of severe pain and it was hoped that if blood came out pain would be eased. However, no blood came out and the deceased died later that evening. P.W.1 was holding an axe while the deceased held a saw.

Phapang Tsoloane (P.W.2) testified that he attended the feast at the home of Lekhooa who is his younger brother. There were many people at the feast and P.W.1 and the deceased were there. He saw them standing about fifteen paces from him and invited them to come and take food. They refused. Thereafter he went into the house but after some time he was informed that there was a fight outside. When he got out he saw that P.W.1 was being chased by A1 and A3. He intervened and enabled P.W.1 to escape. He never saw the deceased.

Lekhetho Tsoloane (P.W.3) was also attending the feast. While he was there he witnessed a fight between the deceased and A1. The latter struck the former on the head with a stick two times. He did not see clearly whether the two blows actually landed on the head because the deceased was warding them off with his hands/arms. The deceased ran away and A1 chased him for a short distance before

giving up. P.W.3 did not see any axe or saw on that day and he is positive that the deceased had no weapon in his hands at the time A1 was assaulting him.

P.W.4 Lekhetho Matjobo testified that he is a headman under Chief Seelane Seelane (P.W.5). On the 26th December, 1989 the three accused came to his place accompanied by many other people. They gave him two swords and explained that the deceased and P.W.1 had attacked them with those weapons. They also gave him three sticks which they (accused) said they used when the deceased and P.W.1 attacked them. The accused did not explain to him that the deceased trespassed on the field of A3. P.W.4 says that he transferred the accused and the weapons to Chief Seelane Seelane who confirms that the accused came to his place together with the weapons mentioned above. They all agreed that they fought with the deceased and P.W.1. A2 explained that he did not know the cause of their fight but he was of the opinion that he was under the influence of intoxicating drinks. The other accused did not give him a clear answer.

Trooper Mckete (P.W.6) went to Hanamaneng airstrip where he found the dead body of the deceased. He examined it and found the following injuries: a wound on the top of the head, a wound on the left forearm, a wound on the left side of the head, a wound on the back of the neck, a wound on the scapula and on the left side of the chest. On the 2nd January, 1990 he gave the dead body to the pilot who flew it to Mkhotlong Mortuary for post-mortem examination. The body was already in an advanced state of decomposition.

It was common cause that the weapons which were given to the police by Chief Seelane could not be traced and were not produced in evidence.

The doctor who carried out a post-mortem on the body of the deceased formed the opinion that death was subdural haematoma on the right side of the head. There was sagittal fracture of the frontal bone. The doctor does not refer to the other injuries which were observed by the police officer.

The deposition of 'Makhethang Mosoeu (who was P.W.2 at the preparatory examination) was admitted by the Defence Counsel as evidence before this Court. She deposed that on the day in question she went to feast at the home of Lekhooa Tsoloane. She saw the deceased and P.W.1 as well as the girls and two women, 'Makhahliso and Manthabiseng. Those people were on a hill above the village. She went up to them and heard 'Manthabiseng and 'Makhahliso say: "Aributi Lefa, stand up and go, you won't be called a coward." Deceased (Lefa) did not say anything. The witness says that she also spoke to the deceased and asked him to stand and go. He said he was resting. They left him there and returned to the village. On their way she noticed that the deceased, P.W.1 and other boys were being chased by many men including the accused. She identified one Mokotsolane. At that time those people were actually chasing P.W.1, she did not see the deceased. At the time she saw the deceased sitting there he was not holding anything in his hands. P.W.1 was also not holding anything.

The accused elected to give sworn statements. A1 says that he saw when the deceased and A3 were fighting in the village. He intervened and the fight was stopped. He asked A3 why they were fighting. A3 said they had walked across his cultivated land. After the fight was stopped the deceased and P.W.1 went to their village which is about five or six kilometres away. They were not hiding anything in their hands. At about 4.00 p.m. he saw the deceased at Lekhooa's place and both of them had swords. When he asked them why they had come back after the first fight they attacked him alleging that he was involved in the first fight because A3 is his brother. A1 says that the deceased tried to hit him with a sword but he managed to ward off that blow with his stick. He hit back and struck the deceased on the right hand. As a result of that blow the deceased dropped his sword on the ground. He denies that he hit the deceased on the head.

A1 says that when he asked the deceased and his companion to go home the deceased asked him when he had started to teach him when he should go home and then he attacked him.

A2's version is that after the first fight between the deceased and A3 he again saw the deceased and P.W.1 at the feast at the home of Lekhooa. They were offered food but declined the offer. Later he noticed that there was a fight between A1 and the deceased; he tried to intervene but P.W.1 attacked him with a sword. He struck P.W.1's hand and the sword fell down. He never had any fight with the deceased. After the fight the weapons used by the

deceased and P.W.1 were collected and taken to the headman.

It is common cause that the deceased was struck on the head with a stick by A3 who has absconded and was still at large when this trial started. A separation of trial was ordered and the trial of A1 and A2 proceeded. Now the first question to be decided is what effect the wound inflicted by A3 had on the deceased. This question has to be decided first because the Crown has failed to prove common purpose between A3 on the one hand and A1 and A2 on the other hand. A1 and A2 had nothing to do with that first fight between A3 and the deceased. The wound inflicted by A3 seems to have had some effect because after that he was seen sitting on the side of a hill and complaining that he felt tired and was resting. I am of the opinion that the sudden tiredness must have been caused by that wound.

There is evidence by P.W.3 that during the second fight he saw when A1 struck the deceased twice on the head with a stick, however, the witness is not sure that the blows actually landed on the head of the deceased because he warded off the two blows with his arms. After that the deceased ran away and was later chased and assaulted by many people. The wounds which were found on the body of the deceased by Trooper Mokeke were many and according to the evidence before me some of them must have been caused by those many people who chased and assaulted the deceased. For instance the wounds on the back of the head, on the left side of the head, on the left scapula and on the left side of the chest. There is no evidence that the said three wounds were inflicted by any of the accused.

In his deposition Lekhooa Tsoloane deposed that in the first fight the deceased was struck on the head with a stick by A3. After that he advised the deceased and P.W.1 to go to their home. They went up the ridge in the direction of their home. They were not holding anything in their hands. From there he went to his home where he had a feast. The deceased and P.W.1 and two others arrived. He invited them to come into the house to eat food. They refused. He went into the house. When he came out fighting had developed. A1 struck the deceased on the head with a stick. He rushed to them and caught A1 and asked him what he was doing. The deceased ran away but fell down.

The evidence of Lekhooa Tsoloane is confirmed by P.W.1 that A1 did strike the deceased on the head with a stick once. It may be that P.W.3 is referring to a different occasion when the deceased was struck twice and appeared to be warding off the blows with his arms. He was not sure that at that time the stick did in fact reach their target.

I am convinced that A1 struck the deceased on the head with a stick and not on the hand as he alleges. There is overwhelming evidence that at the time he was struck on the head, the deceased was not holding anything in his hands. He was not holding any sword, saw or an axe. The blow inflicted by A1 had a devastating effect on the deceased because it even caused him to fall down when he attempted to run away.

Mr. Peete, attorney for the defence, dealing with common purpose, referred this Court to the case of R. v. Zwakala and another, 1976 L.L.R. 221 whose headnote reads as follows:

"Persons may be held liable for the acts of each other if they act in pursuance of the same purpose and have agreed to that purpose. The agreement may commence on impulse without any prior consultation. For sufficient common purpose to exist the persons need not plan together to kill the deceased. The basis of the guilt of a Socius criminis is however his own mens rea. Where common purpose to murder is established it does not necessarily follow the same intent must be imputed to all involved parties. In the circumstances of the case the presence of intent on the part of the accused found to be manifest by the seriousness of the assault, the weapons used and the part of the body where injuries were inflicted."

He submitted that while it is not in dispute that there was trouble between the accused and the deceased and P.W.1, it is still incumbent upon the Crown to show beyond reasonable doubt that one or the other of the two accused inflicted the wounds that caused the death of the deceased. The case against A3 having been withdrawn (actually, trials having been separated) the acts of A3 cannot be imputed to the two accused unless the indictment alleged specifically that they acted in concert with A3. In the circumstances each accused can only be held criminally responsible for his own acts and upon his own mens rea. He submitted that in this case the Crown has failed to prove that the two accused had planned with A3 to attack the deceased.

I agree with Mr. Joffe that the Crown has failed to prove common purpose. However, in my view the Crown has proved beyond any reasonable doubt that A1 caused the subdural haematoma that was the cause of the death of the deceased. Or even if A3's blow had had an effect on the brain of the deceased, A1's blow accelerated the death of the deceased. In the view that I have taken it had a devastating effect which killed the deceased. I am of the view

that the Crown has proved that but for A1's conduct the deceased would not have died when he did. (See Hunt: South African Criminal Law and Procedure, Vol. II pp. 325-5).

I have formed the opinion that the self defence raised by A1 has been proved to be false beyond any reasonable doubt. The impression one gets from the evidence is that A1 was aggressive when he noticed that the deceased had come back with other people after the first fight had been stopped. He went to them and ordered the deceased to go home. The deceased said that A1 had no right to tell him when to go to his home. It was at this juncture that A1 attacked the deceased. A1 is not telling the truth that the deceased attacked him with a sword when he asked him why they had come back after the first fight. He is not telling the truth that the deceased and P.W.1 were armed with swords. All the Crown witnesses who testified before this Court did not see the swords and were quite sure that the deceased and P.W.1 were unarmed. They were not holding any saw or axe. The fact that after the fight the accused and some other people gave the two swords allegedly found at the scene of the fight was an attempt to falsely implicate the deceased and P.W.1 and an attempt to boost the accused's self-defence. When the deceased and P.W.1 were seen standing outside the house of Lekhooa Tsoloane they were unarmed, although they did not accept the offer of food made to them, there is no evidence that they acted in a provocative way towards anybody. It was A1 who acted in a provocative way when he ordered them to go to their homes and attacked them. He had no right to expel them.

The case against A2 is supported by the evidence of one eye-witness i.e. P.W.1. I am of the opinion that the evidence of P.W.1 is unreliable because at the relevant time he was also being attacked by a mob. He said that when they left the home of Lekhooa he was walking in front of the deceased. He looked back and saw when A1 struck the deceased on the head with a "lebetlela" stick. He tried to intervene but realised that there were many people attacking them. He ran away. It seems to me that he did not have a good chance to observe the events. In any case A2 denies this and gives an explanation that he was at the kraal when the fight started. People who were fleeing came to him and P.W.1 attacked him. He hit him on the hands forcing him to drop his weapon. I think his story may be reasonably possibly true. I doubt very much that he saw well that P.W.1 was armed with a sword. However, I am of the opinion that the doubt I have regarding the evidence of P.W.1 must be exercised in favour of A2.

In the result I come to the conclusion that A1 had the intention to kill in the form of dolus eventualis. I accordingly find A1 guilty of murder.

A2 is found not guilty.

My assessors agree.

J.L. KHEOLA

JUDGE

26th April, 1991.

EXTENUATING CIRCUMSTANCES

I found that there was no premeditation and that the intention the accused had was in the form of dolus eventualis. These two factors are extenuating circumstances.

SENTENCE:- In passing sentence I took into account that the accused is a first offender, he is married with five children and that he is an uneducated and unsophisticated Mosotho peasant living in the rural areas where the use of these heavy "lebetlela" sticks is a common occurrence. They are traditional weapons that people go about in the villages holding them. Be that as it may it is the duty of this Court to protect the community from unlawful attacks with such weapons especially where a person has been killed. A deterrent sentence must be imposed.

In the result the accused is sentenced to seven (7) years' imprisonment.

J.L. KHEOLA
JUDGE

26th April, 1991.

For Crown - Miss Moruthoane
For Defence - Mr. Peete.