CRI/T/34/90

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v

LERATO MOTSOENE

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 4th day of June, 1991

In this brief trial the accused is charged with the murder of a 9 year old herdboy Tsepo Shea who died from injuries to his head on 1st July, 1989 at Ha Kulubane in the district of Mohale's Hoek.

The accused pleaded not guilty to the charge.

With a view to shortning the proceedings the defence admitted the preparatory depositions of the following witnesses:

P.W.1 : Dr. Olowolagba
P.W.7 : S/Sgt Tsolele and
P.W.8 : Tpr Ramoketa

The Crown accepted the admissions and rejected the offer of a plea of Culpable Homicide proposed by the defence.

The Crown further dispensed with the preparatory depositions of P.W.5 Sekhele Motsoene and P.W.6 Malise Shea.

The admitted depositions were read into the recording machine and made part of these proceedings along with

/Exhibit "A"

Exhibit "A" the post mortem report and Exhibit "1" collectively relating to a stick and a sjambok.

P.W.2 Mokhoane Shea a relative of the deceased in the sense that the deceased is his uncle's son testified that on the day in question he was herding after sheep; while P.W.4 Makhase was herding after cattle belonging to the accused's father.

It is common cause that the accused has no livestock of his own. P.W.2 further testified that P.W.4 was also looking after the accused's father's donkey that day.

At around sunset P.W.2 and one Mosiuoa Shea P.W.3 were driving sheep home. Both heard the deceased cry. When they looked back P.W.2 saw the accused grab hold of the deceased and fell him to the ground. In the same process the accused is said by this witness to have snatched the deceased's stick and hit him with it on the forehead and behind the head. He further testified that the accused thereafter stood aside and when the deceased rose and staggered forward the accused lunged at him and smacked the deceased twice with the sjambok at the back. The deceased fell to the ground and the accused did not hit him again.

P.W.2 testified that he heard the accused reply to P.W.6 as follows :

> "This child of yours rides on this donkey of mine".

P.W.2 further heard the accused utter the following words in response to P.W.6's disapproval of the assault following the minor offence of riding on a donkey :

> "Yes I'd rather go to jail for him".

The evidence of P.W.3 and 4 is essentially the same as the evidence of P.W.2. All of these witnesses were adamant that there was no donkey at the scene where the

/accused

accused meted out the assault on the deceased. All of these witnesses stated that at no time was the deceased and P.W.4 riding on the accused's father's donkey. They said this never happened either that day or any time previously.

P.W.4 is a small boy whose age was estimated by this Court to be about 8 years. He was warned to tell the truth and his evidence treated with caution similar to that of an accomplice witness. His testimony that there was no donkey in the vicinity of the area where one would expect witnesses to see it if small boys fearing the accused's immediate threats to beat them quickly dismounted from it is supported by P.W.2 and 3. It is a further aspect of P.W.4's testimony that when he realised that the deceased was being assaulted by the accused P.W.4 himself was enkraaling the donkey in question.

The accused's version is that on the day in question he saw P.W.4 and the deceased riding on his father's donkey; and was vexed that they should be doing so while the cattle they were supposed to be looking after were destroying crops nearby. Needless to say the question of any animals destroying crops was never put to Crown witnesses. The accused said on that occasion he was intending to collect some harvest from the fields. He went further to say the deceased was obstructed from his view by P.W.4 who on hearing his name shouted by the accused dismounted and hurriedly made for the cattle which were destroying crops while his mate who had turned his head back apprehensive of the fact that the accused was nearby and likely to punish him got spilled from the donkey one and half metres nigh and landed on a stony surface. Because the accused was so close when this happened he could not restrain his lashing hand movement from whipping the deceased once with the sjambok when the latter rose and tottered forward. The deceased fell and the accused even tried to help him by supporting him and asking for help nearby, so his story went.

/He

He adamantly denied that he struck the deceased with a stick. He buttressed his denial by stating that he had not set out to fight the deceased for the deceased was a small child whom he was fond of and thus could not find it in his heart to attack him first with a stick and then with a sjambok.

The accused was hard put to it to explain why if he saw that the deceased had landed on his head when he fell he nonetheless administered a blow with the sjambok at the deceased's back. The accused has not denied that from the fall that preceeded the whipping administered by him at the deceased's back the deceased staggered. The evidence that the deceased staggered after rising from where he had fallen has not been denied by the accused. He however denies that he had felled the deceased and hit him twice with a stick on the head.

Medical evidence discloses intradural haematoma as a result of a fractured skull (occipital region). There was also evidence of brain soaked in blood.

I have no doubt in my mind that if this was a result of a fall it must have been from a very high ultitude. Definitely more than three metres in height. Likewise if it was a result of a stick blow the blow must have been severe and effected with great force.

The accused sought to explain this by saying the donkey from whose back the deceased fell was quite high and estimated it at one and quarter metres tall.

Asked why the Crown witnesses' evidence implicating him should be so uniform he replied that this was because the Crown witnesses are related to one another and they must have put their heads together to revenge against him as death had nonetheless occurred to their next of kin.

The accused's story was not only improbable but totally false. During the course of his prevarications

/he

he told the Court that the spot where the deceased fell was not stony. When it was pointed out to him that this was opposed to the story put on his behalf to the Crown witnesses he resiled from this stance and said it was stony. Asked why in the first instance he had said it was not stony he said he neversaid so. Confronted with the mechanical recording of his voice clearly audible when the recording machine was played back he owned up that indeed he had said the place was not stony. Asked whether the question put to the Crown witnesses was consistent with his instructions, he said it was. Asked whether then he was aware that his former statement that the place was not stony was consistent with the Crown version he introduced a new factor namely that the place had a flat rock covered by a moss of grass where deceased's head landed. Asked whether he heard his counsel ever putting to the Crown witnesses that the place where he said the deceased landed on his head during his fall from the donkey had a flat rock he truly stated that this was never put to them.

Mr. Mokhobo for the Crown drew to the Court's attention that this matter rests on credibility. Three Crown witnesses stand contradicted by the accused. If it was a matter of numbers it were an easy thing to say the accused is out-voted or out-numbered thus his version should not succeed. But because it is not so much the numerical preponderance of witnesses as the weight of evidence that requires consideration the Court's mind should be exercised with the view to establishing if the Crown relying on tne evidence it has adduced has discharged the onus cast on its shoulders.

Mr. Mokhobo submitted that even if the deceased fell from the height of that donkey, and even if there was a flat rock on which the deceased landed on his head he could not have sustained the injury observed by the doctor in his examination of the body during tne autopsy. He submitted that the height indicated was low even though the

/accused

accused sought to place this donkey in a class of very high donkeys. In any event P.W.4 said that donkey was wild and he and the deceased could not have ridden on it apart from the fact that it was in the kraal when the deceased was being molested for having ridden on it. Mr. Mokhobo buttressed his contention by showing that even if the accused were to be believed in his invention of a version that is at variance with the Crown's the deceased could not have fractured his skull from the height he is supposed to have fallen taken along with the fact that the accused said the flat rock was covered with grass thus providing a cushion that would have served to absorb the impact and avoid severity that could have caused the fracture of the deceased's skull. Indeed in this connection the accused is entangled in a web of lies of his own making because in order to provide an excuse why it was never put to the Crown witnesses that there was a flat rock there he said it was covered with grass. Clearly this to me seems to have been intended to explain why the Crown witnesses could not have seen the flat rock that was visible to him and him alone.

In the resourceful chambers of his mind the accused has contrived to say there was a flat rock. But because he is aware that if such a rock existed it should then have been visible to the Crown witnesses who were in the vicinity he contrived further to say it lay under a moss of grass. This now coupled with the fact that he said the deceased's blanket covered his head as he got spilled from the donkey puts the accused in a cleft stick because that growth of grass would serve as a cushion preventing the fall from resulting in the fracture of the skull.

Of course I agree with Jacobs C.J. (as he then was) that an accused who lies should not be convicted solely because he is lying for a man desperate to relieve himself from the apprehended danger of the gallows might be tempted to employ whatever device to avoid such grim possibility. But I agree again with that learned Chief

/Justice

'Justice that -

> "(The accused's)ilies might in certain circumstances sufficiently swing the balance against him....."
>
> See Rex v. Mapefane CRI/T/80/71 (unreported) at 8.

Mr. Mokhobo submitted that although it was not plainly stated the accused seemed to suggest that his plea to the charge of murder is based on provocation. The learned Crown Counsel submitted that even so this type of provocation does not come within the provisions of our Criminal Law (Homicide) Proclamation 42/1959 in the sense that even if the accused was provoked and acted in the heat of passion this cannot be the end of the story because he has yet to accommodate himself within the provisions of Section 3(2) saying that provocation has to bear reasonable relationship with the act that caused the accused to kill.

He thus submitted that the accused had no reasonable excuse for using the stick on a 9 year old boy for the supposed offence of riding on a donkey or even of letting the supposed stock damage the crops.

Relying on R. v. Kelly 1980(3) SA at 302 the learned counsel emphasised that demeanour cannot serve as a substitute for evidence and prayed that the Crown witnesses whose evidence was adduced and heard should be accepted as true especially that of P.W.4 the under aged boy whose evidence was corroborated in all material respects.

He further stated that if the Court should believe that the accused used the stick as attested to by eye-witnesses then an inference of guilt should follow founded on the fact that the injury was inflicted on the head a very vulnerable organ and that the degree of force used was savage. This being shown by the fact that the stick cracked and the skull fractured.

/Thus

Thus he submitted that the accused acted recklessly and without regard whether death occurred or not.

Mr. Pitso for the defence submitted that it is strange that the Crown evidence does not say why the accused used the sjambok as it does concede the sjambok was used. On this he sought to show that the accused's story that the deceased had ridden on a donkey is probable. But in my view, this does not support the more plausible story that cattle were destroying crops while the donkey was being ridden - a matter which could have served to render the accused's anger more justifiable. But the question of the cattle destroying crops seems to have been invented as the accused was going on in his evidence. It was never put to the Crown witnesses.

As for the question of motive that it seems Mr. Pitso is justly concerned with, I wish to refer to C. of A. (CRI) No.2 of 1983 LETSOSA MANYANE vs REX (unreported) at 3 where Schutz J.A. (as he then was) observed that :

> "..... It is true that it is not essential for the Crown to establish motive, but its failure to do so may cast doubt upon its case".

I however prefer the unqualified statement by Malan J.A. when referring to motive in R. vs. MLAMBO 1957(4) SA 727 at 737 as follows :

> "Proof of motive for committing a crime is always highly desirable, more especially so where the question of intention is in issue. Failure to furnish absolutely convincing proof thereof, however, does not present an insurmountable obstacle because even if motive is held not to have been established there remains the fact that an assault of so grievous a nature was inflicted upon the deceased that death resulted ....."

/Mr. Pitso

Mr. Pitso sought to cast a doubt on the bona fides of the Crown witnesses who gave identical version of events almost word for word. I agree with this submission. He submitted that the Court should be wary of exaggerations by the Crown witnesses regard being had to the fact that they are related to the deceased. I agree with this too.

But because his plea seems to be that of provocation I find that this does not bear reasonable relationship with the perceived act that led to death.

The accused is found guilty of murder on the basis of dolus eventualis.

The Court has been asked in the plea in extenuation to consider the following :

(1) Absence of premeditation
(2) Element of provocation
(3) The conviction for murder was on the basis of dolus eventualis as opposed to dolus directus.

The Court finds that even though the last factor mentioned above does not always help to extenuate as borne out in C. of A. (CRI) no.5 of 1980 Khoabane Bello vs R. (unreported) at 8 where Schutz J.A. (as he then was) said

> "a finding of dolus eventualis ..... is sometimes a basis for finding extenuation, but in my view it is not sufficient in this case".

it should avail the accused in this case.

But as I stated this factor taken along with the first two advanced by Mr. Pitso would tend to lead to a finding that extenuating circumstances exist in this case. The Court so finds.

The Court having been addressed in Mitigation imposed a sentence of nine (9) years' imprisonment.

My assessor agrees.

J U D G E
5th June, 1991

For Crown : Mr. Mokhobo
For Defence : Mr. Pitso