

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

v

MOHLOLO MOSHOESHOE
MONYASE RASELLO
QENEHELO MOETI
THABO MAITSI
TAMANE RASELLO
KATA NCHEE
MOTLATSI RAMAOLO

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 17th Day of August, 1994.

All the Accused got bail almost immediately after arrest. The events that are the subject of this criminal prosecution occurred on the 8th February, 1988. The preparatory examination which normally follows the cases of murder like this one began on the 14th June, 1989. Even so only 9 of the 17 people originally charged were in attendance. Some of the accused were joined as the

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Preparatory Examination went on. Some of the Accused were committed for trial before the High Court on the 18th January, 1990. Even when this happened 5 of the Accused were not there. Interestingly on the 28th March, 1991 one of the Accused was arrested for failing to attend the Preparatory Examination, he sat down for the Preparatory Examination even at this stage.

Nine Accused had been indicted of murder by the Director of Public Prosecutions. On the August, 1994 when the trial eventually commenced one of the Accused had died, so had several witnesses and potential witnesses. Before the Accused pleaded the Crown withdrew the charge of murder against Chief Leboto Jonathan who had been the First Accused at the Preparatory Examination. Seven Accused of whom Mohlolo Moshoeshoe was Accused Number One were called upon to plead to the charge of murder and they all pleaded not guilty.

Three Crown witnesses gave *viva voce* evidence. The Medical evidence was admitted by consent. Consequently the doctor's deposition together with the medical report were read into the record. The medical report handed in by consent and marked Exhibit "A". The deposition of the

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late Phakiso Peimane who was made PW.5 and that of the late Thabiso Mokeke marked P.W 6 were also read into the record. The evidence of Azael Nthathane was admitted by consent and read into the record and it was made P.W 7.

The unfortunate deceased Mohato Moshoeshoe was suspected of stealing Chief Leboto Jonathane's cattle. Deceased was a headman under Chief Leboto Jonathan, consequently when he was called before the chief in connection with this allegation many people came out of curiosity. Consequently the chief's court was packed with people that day.

The chief had lost two of his cattle and within a day or two they had been found into the custody of the police. P.W 6 Thabiso Mokeke now deceased alleges that he was made to falsely accuse deceased of theft through threats. The late Phakiso Peimane P.W 5 was also accused of also being a party to the Deceased's alleged theft. P.W 5 and the Deceased had denied the theft. In the light of the foregoing it is clear that the Crown was at pains to show Deceased was a victim of an error of judgment or a malicious false accusation of theft.

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The evidence of P.W 1 David Mokhutlulu (a man of 55 years of age) in a nutshell is to the effect that he went to the chief's court at Mahlabatheng. It was on a Sunday. Many men had gathered and among these were some of the accused. The Chief of the area Chief Leboto Jonathan was present. Deceased and the late Peimane P.W.5 were being asked questions in connection with the theft of Chief Leboto Jonathan's cattle. They denied the theft of those cattle. Malikela (whom I understand is also deceased) was called and he said Peimane handed those cattle to some people in the presence of deceased. Chief Leboto Jonathan left, leaving Mosiuoa Mapetla in charge of the proceedings in which deceased was asked questions.

Ramotebang Mapetla now deceased produced handcuffs and handcuffed one hand of Peimane saying those were his instructions. When he tried to handcuff the deceased along with Peimane, deceased objected and said he would not be handcuffed when he does not know what he has done. P.W.1 was at the time sitting next to the Deceased. A voice said take away the pistol from the deceased's waist. P.W.1 realised some people were standing. Just then P.W.1 heard a gun report. The light that had been lit was extinguished. There was pandemonium, some people rushed

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out through the door while others went out through the window.

As deceased went out through the door, P.W.1 heard Deceased say, "You assault me, your mother's vagina". P.W.1 was left in the house with Peimane, Malikela and Malefetsane. When P.W.1 went out of the Court, he realised Deceased had fallen below the stoep. People were assaulting Deceased, only P.W.2 Mosiuoa Mapetla was trying to stop them saying, "Stop men". At that stage, he saw Accused Number One with an iron rod or a sword about to assault Deceased. He said to P.W.1, "Do not ask questions, don't you see this man has shot me". Accused One threatened P.W.1 apparently because P.W.1 seemed to be about to dissuade him from assaulting deceased. At this time P.W.1 went behind the house nearby to urinate and then spent some time there smoking.

P.W.1 emerged from behind the house to find the deceased carried on a wheelbarrow on the way to Chief Leboto Jonathane's house. When they were at the Chief's place he heard Accused Number One say he does not wish to be put in the same house with his enemy. By enemy Accused One was referring to the Deceased. P.W.1 then left. The

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night was dark. There might or might not have been any clouds in the sky, P.W.1 does not remember. Accused One was still able to walk. P.W.1 then left for home with Monyase Rasello (Accused Two) and Accused Five.

The next Crown Witness P.W.2 Mosiuoa Mapetla aged 73, told the Court that he was the headman of the village. He could not read and write but he was unusually good at estimating time. He was very intelligent and a good communicator who gave his evidence well. His eye-sight was very bad but he claimed in 1988 his eye-sight was still very good. The Accused did not challenge this fact.

P.W.2 said many of the Accused had joined him out of curiosity when he had been sent to summon Deceased and Peimane (P.W.5) before the Chief, Leboto Jonathan. The only person who had been instructed by the Chief to go with him to call Deceased and Peimane was Tšokolo Tsitsinyane. Although P.W.2 initially denied this fact, it emerged during cross-examination that Chief Leboto Jonathan had given him a letter with which to invite Deceased to appear before him. Everything was not verbal as P.W.2 had initially told the Court.

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Many people attended this enquiry into the theft of Chief Leboto Jonathan's cattle with which Deceased and Peimane were suspected. According to him more than 25 people were present. Deceased and Peimane denied the allegation although Malikela said they had taken the cattle. P.W.2 claims he left for home leaving the questioning to continue. When he was between 100 and 200 paces he heard a gun report. He went back to investigate. When he was about 40 paces from the chief's court, he heard Deceased say, "You assault me your mother's vagina". He saw Deceased was being assaulted by many people and that he was stumbling. He could not distinguish the assailants clearly because they were many.

As Deceased fell, he came between Deceased and his assailants pleading with them to stop. He was assaulted along with the Deceased as he virtually lay on top of the Deceased. After he had reprimanded these people they stopped and stood some distance away. It was at that stage that P.W.2 observed the people who were at the front of the crowd. These were Accused One, Accused One's brother Tsietsi (now deceased), Lillo Tšiu, Jordan Maitse and Accused Number Seven. The impression that P.W.2 might have created by implication in his evidence in chief was

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that when he saw these people who must have been assaulting Deceased because none of the many people in the vicinity was stopping the fight. In cross-examination he clarified the position by saying he observed all these people after he had stopped the fight.

It was when the general assault on the Deceased by part of the crowd had stopped and it had stood aside that Accused Number One left the Crowd and came to P.W.2 and the Deceased. Accused Number One was carrying a sword or a metal object that looked like a sword which was made out of a plough handle. Accused One asked his brother (meaning Deceased) why Deceased had shot him. Both Accused One and Deceased share the surname of Moshoeshoe and are therefore cousins. Deceased at the time was sitting on his buttocks showing signs of being injured. P.W.2 says he looked carefully at the object Accused One was carrying.

As Accused One came towards the Deceased P.W.2 stepped back. Accused One delivered a blow on the Deceased on the head. P.W.2 says he rebuked Accused One but Accused One said:

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"I will kill you with him if you protect people who shoot us."

P.W.2 said he did not intervene because Accused One had a weapon which P.W.2 could not be able to ward off. Accused One delivered several blows on the Deceased. Deceased had no chance to do anything. None of the other people gathered did anything. When Accused One had finished, he went away. P.W.2 says he saw P.W.1 for a short time during the assault. The fracas may have lasted about ten minutes. P.W.2 says he then left to go and report what had happened to the chief.

Deceased was brought to the chief's home in a wheelbarrow. P.W.2 did not see anything else that night. The following day he went for the police. By then Deceased had died. He came with P.W.3 Detective Warrant Officer Molefi. P.W.2 says he gave P.W.3 the names of the people he saw during the fracas. P.W.3 took the body of the Deceased together with some of the people he mentioned including Accused One who was injured. Both Accused One and P.W.2 were sent to the doctor for medical attention by P.W.3.

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Under cross-examination P.W.2 was insistent that Accused One was able to walk during the time he saw Accused One assaulting Deceased. P.W.2 denied that Accused One was so badly injured that he could not have assaulted Deceased. In cross-examination P.W.2 states that some people were just standing outside the chief's court. There were those who were assaulting Deceased and those who were not. P.W.2 says he received blows on the arms, the thighs and all over at the time he had spread himself over the deceased. He was not hit on the head. At this time he could not see everything else. P.W.2 was taxed about the effect the gun shot would on Accused One's thigh, he was emphatic that it did not cause Accused One any loss of mobility.

When during cross-examination it was put to P.W.2 that Accused One does not own a sword nor did he have one that night. P.W.2 said Accused does have a sword. His reason for saying that is that Accused One produced that sword and handed it to P.W.3 Warrant Officer Molefi before they were taken away by P.W.3. P.W.2 says at one stage he was detained by the police Leribe as a suspect that is why his evidence is not identical to what he said at the Preparatory Examination. P.W.2 did not seem to

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distinguish between the statements he made at the Preparatory Examination and to the Police. P.W.2 said he was detained for a month as a suspect, he later corrected himself and said he was detained for two days. I found this error surprising because as I noted from the outset P.W.2 has a sense of time that is exceptional for an illiterate person. P.W.2 insisted that he saw Accused 7 among the people in the front row of the group that had stood aside after they had stopped the group from assaulting the Deceased.

The medical evidence shows that Deceased's skull was smashed. There are cuts on the head. Deceased died of subdural haematoma. The doctor's deposition was admitted by consent (as already stated) and it was made P.W.4. The deposition of the late Peimane P.W.5 who is deceased deals with his ordeal but does not deal with the details of the stick fight because he claims he remained in the Chief's court with Accused Seven and others.

The deposition of P.W.6 Thabiso Mokeke (also deceased) was read into the record. P.W.6 claims he was made to lie and say Deceased had stolen cattle by Chief Leboto Jonathane, Kata Nchee (Accused Six) and Monyane.

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These people wanted the truth (so he says) but all they could accept was the lie that Deceased stole Chief Leboto Jonathan's cattle. They had said if he did not speak the truth they would kill him. P.W.6 said he was never assaulted. This evidence from its nature could not persuade me and the Assessors that it was evidence of quality. Since it was not relevant to this case we did not find it useful. The evidence of P.W..7 Azael Nthahane deals with the finding of cattle and is not of any importance.

The Crown closed its case. Accused numbers 2, 3, 4, 5 and 6 were discharged on the grounds that a *prima facie* case had not been made against them. Only Accused numbers 1 and 7 were found to have a case to answer.

Accused Number One gave evidence in his own defence. His evidence was simply a denial that he assaulted Deceased. The reason being that he was shot on the thigh, therefore because of pain he could not walk. All evidence against him is false, so he said. He said P.W.2 was telling lies about him because they have quarrelled over animals that destroyed Accused One's crops. Deceased had shot him because he said Accused One talks too much.

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P.W.3 was telling a lie when he said Accused Number One handed a sword to him. In any event the sword did not exist for the court to see. He admitted that a sword had been an exhibit before the magistrate.

I have no hesitation in saying I believe the evidence of P.W.2 that Accused One was still able to move. It was dark but not so dark that a person at three paces could not be recognised. P.W.2 knew Accused One very well. Accused Number One did speak telling P.W.2 not to intervene because he would kill P.W.2 if he helped deceased, because deceased had shot Accused One. I believe what P.W.2 says namely that Accused One hit Deceased several blows on the head while Deceased was sitting down after sustaining some injury from the first assault. The injuries that deceased sustained are consistent with the weapon used by Accused One. No wonder Deceased's skull was smashed. I have no hesitation in rejecting the evidence of Accused Number One as untrue.

Accused Number 7 did not give evidence and closed his case. The Court has decided to give him the benefit of doubt as the evidence of P.W.3 in itself is not enough for the Court to convict. The evidence of P.W.2 does not

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form an adequate link in the chain to secure a conviction. As the people had gathered at the chief's court for a lawful purpose their presence there cannot suggest any unlawfulness merely because they did not help Deceased during the fight.

The problem I have to grapple with is whether Accused is guilty of murder or culpable homicide.

Accused One never in our view had any cooling off period. From the time he was shot to the time Accused One belaboured Deceased on the ground there was never a determinable cooling off period. The fight which took place was a fluid one. P.W.2 said the fight took ten minutes. It could have been much shorter. Accused One seems to have been involved throughout. Therefore it is safer to find Accused One guilty of culpable homicide not of murder.

Accused One is found guilty of culpable homicide.

Accused Number Seven is found not guilty and is discharged.

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My Assessors agree.

W.G.M. MAQUTU
JUDGE

Delivered at Maseru This^{17th}.....Day of August, 1994.