CRI/T/47/92

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

and

'MAMOLUMELI MOLEFE Accused

J U D G M E N T

Delivered by the Honourable Chief Justice Mr. Justice J.L. Kheola on the 11th day of November, 1994.

The accused is charged with the murder of Joseph Molefe (hereinafter called the deceased) in that on the 25th March, 1989 at or near Ha Sekajane in the district of Butha Buthe, the said accused did, acting unlawfully and with intent to kill assault the deceased by pouring petrol or inflammable liquid over him and setting him alight thus causing him to sustain severe burns from which the said deceased subsequently died.

The accused pleaded not guilty.

The post mortem examination report was handed in by consent of the defence without calling the doctor who made it. It was marked Exhibit "A". The doctor does not state the cause of death. Under paragraph 8 of Exhibit "A" entitled **"REMARKS'** he has stated "Severe burns - surface area 50%. The same remarks appear under paragraph 9.

Most of the facts of this case are common cause. They are that the deceased and the accused are husband and wife. The deceased was working in the mines in the Republic of South Africa and had come home for the weekend. He arrived on the 24th March, 1989. On the following day the couple went to a neighbouring village called ha Lepatoa in order to attend a feast for their son who was not well. As a result of consuming considerable quantity of Sesotho beer the accused and the deceased were drunk when they left for their home that evening. The deceased was the first to arrive at home and asked his daughter 'Makopane (P.W.2) to give him food. She explained to him that there was no food except bread made of mealie meal. He said that he did not like that.

Thereafter the accused arrived and the deceased asked her to give him food. She hurriedly cooked soup and gave it to him together with bread. The deceased said that he did not like soup and scolded the accused saying that she was squandering his money with her relatives. The accused alleges that as he was scolding her he attempted to kick away the food she was giving him but missed. The couple angrily exchanged some words before the accused went out of the rondavel. The deceased again sat down after the departure of the accused.

The accused was away for only a short time and returned to the rondavel. When she appeared at the door she was holding a two-litre-tin containing petrol. She ordered the children, who were sitting around the fire at the fire place which was in the

middle of the rondavel, to get out. The younger children complied with her order but P.W.2 did not go out at that stage. The deceased was still sitting near the fire. P.W.2 estimated that he (deceased) was about three paces from the fire. After ordering the children to get out the accused threw the petrol over the deceased and drenched him. As she thus splashed the petrol some drops of it went to the fire and caused flames which engulfed the deceased. He went out to the forecourt while the clothes he was wearing were still burning. P.W.2 brought water and doused it over the deceased. The fire was put out but the deceased had sustained second degree burns; when the burnt clothes were removed the skin peeled off leaving the body of the deceased as red as blood. The burns covered the neck, the chest and down to the waist.

It was common cause that the deceased did not render any assistance when the fire was being put out. She went behind the house crying. She remained there until P.W.2 fetched her after the deceased had been taken to the hospital in a vehicle. The hospital to which he was taken is St. Charles R.C.C. Hospital which is about fifty kilometres from the village of the deceased. On the following morning a report was received that the deceased had passed away. There is no evidence that the deceased did in fact reach the hospital that night. There is no evidence that he received any treatment anywhere. All what we have is the post-mortem examination report which reveals that on the 31st March, 1989 the corpse of the deceased was at the butha Buthe Government hospital where it was examined. It had the same burns

which it sustained on the 25th March, 1989. There were no other injuries.

There is a statement in the deposition of one 'Matlhoriso Polo to the effect that "the deceased did get further injuries on the way." There is overwhelming evidence that 'Matlhoriso did not accompany the deceased to the hospital. In her deposition she does not say that she accompanied the deceased. In any case the original handwritten manuscript seems to suggest that the above statement was added to the deposition in an unsatisfactory way some time after the deponent had signed the deposition.

The version of the accused as to what happened is somewhat different from that of the Crown. She says that after the deceased humiliated her by refusing to accept the food she offered him and accusing her of squandering his money with her family, her feelings were hurt and she was very angry and was even crying when she went out of the house. As soon as she got out she saw a tin near the door. She thought that it contained oil. It suddenly crossed her mind that she must take the oil and pour it on the deceased as a sort of some punishment for what he did to her. She took the tin of oil and returned into the rondavel. When she came to the door she ordered the children to get out. She then splashed the deceased with the contents of the tin. His clothes caught fire and he was engulfed in flames. She says that when she saw the flames she became frightened and left without rendering any assistance to the deceased.

The first issue which was argued before me was whether the accused had the requisite intention to kill the deceased when she poured the petrol on him. **Mr. Ramafole**, submitted that the accused had the intention to kill because when she appeared at the door holding a tin full of petrol she ordered the children to get out. She was aware that the petrol would catch fire and injure her children. She did not like that her children should suffer any injury. I agree with that submission. At that time the deceased was sitting down near the fire and posing no danger to the accused. It cannot be said that the accused was defending herself.

Mr. Teele, counsel for the defence, submitted that the accused had no intention to set the deceased alight because she could not have foreseen that the petrol would catch fire. Furthermore the deceased was sitting about three paces from the fire. I do not agree with this submission. According to P.W.2 the members of this family knew very well that petrol is a very inflammable liquid; and for that reason it was kept in the rectangular house away from fire which was usually made in the rondavel. The accused clearly foresaw that the petrol would catch fire but because her intention was to burn the deceased she went ahead and poured the petrol on him. I take the view that the accused had the intention to burn and kill the deceased.

It was submitted on behalf on the accused that she did not know that the contents of the tin were petrol because petrol was usually kept in the rectangular house but the tin in question was

found just outside the rondavel. It is not true that the tin was found lying outside the rondavel. If this had been true it would have been put to P.W.2 in cross-examination how the tin had left the house in which it was kept. P.W.2 was at home the whole day while the accused and deceased had gone to ha Lepatoa and only returned during the evening. She (P.W.2) said the petrol was in the other house and no suggestion was made to her that this particular tin was just lying outside the rondavel. In my view this was an afterthought on the part of the accused. **Mr. Teele** is a counsel of this Court with considerable experience and could not have failed to put the defence case to the only star witness of the Crown.

Be that as it may I have given proper consideration to the accused's evidence and have come to the conclusion that it is not reasonably possibly true. In fact the Crown has proved that it is false beyond a reasonable doubt. Petrol has an awful smell which cannot be mistaken for ordinary oil. The latter is a thick liquid which cannot be easily thrown or splashed on somebody from some distance.

The second issue argued before me was that the Crown has failed to proved that the injuries, admittedly caused by the accused, were the cause of death of the deceased. As I said earlier in this judgment the doctor who performed the post-mortem examination on the body of the deceased did not state what the cause of death was. However it is clear from his report that the only injuries the deceased's body had were severe burns covering

50% of the surface of the deceased's body. According to the evidence of another witness the burns covered the area from the neck to the waist. When the deceased was carried to the hospital the injuries mentioned above were the only injuries he had. When the post-mortem examination was made the above injuries were still the only ones he had.

In **Rex v. Mahao Matete** 1979 L.L.R. 324 at pp. 329-331 Rooney, J. said:

"The absence of medical evidence as to the cause of death, when such evidence ought to have been available presents particular difficulties for a trial court. In **Waihi and Another v. Uganda** (1968) E.A. 278 at 280 Spry J. delivering the judgment of the Court of Appeal for East Africa said:

> "Such evidence is always desirable and usually essential. but, there are exceptions. There have, for example, been several cases in East Africa where persons have been convicted of murder, although the body of the victim has never been found and the case against the accused depended entirely on circumstantial evidence. There may be other cases where medical evidence is lacking but where there is direct evidence of an assault so violent that it could not but have caused immediate death. On the other hand, where there is medical evidence and it does not exclude the possibility of death from natural causes, the task of the prosecution is very much harder and only in exceptional circumstances could a conviction for murder be sustained."

The problem has engaged the attention of this court. In **Thabiso Tsomela v Rex** 1974-75 L.L.R. 97 at 98 Cotran, J. (as he then was) said:

"In one case before Evans J, (**R. v. Emile**

Ntloane, 1967-70 L.L.R. 48) the learned Judge stated:

> "Now in all cases that have been consulted there was some medical evidence adduced. In some it was rejected in others accepted, but here there is no medical evidence therefore it is not competent for this Court to find that the cause of death has been established, the accused cannot, in these circumstances, be found guilty of murder."
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> The underlining is mine.

With respect I find the underlined statement rather sweeping. I think the learned Judge was there confronted with the problem of a possible break in the chain of causation for although the accused shot the deceased from almost point blank range, he survived for some days and was transported to a Maseru hospital during which time, a village lady attendant saw fit to insert her finger into the bullet wound in an attempt to stop the bleeding. The doctor who did the post-mortem was not called, but it was possible on the evidence adduced relating to the medical treatment deceased received in hospital to infer that there was, or might have been, a **novus actus interveniens.** A not dissimilar situation has recently occurred before Mapetla C.J. in **R. v. Leshoboro Masupha** CRI/T/12/74 - unreported) where **Evans J.'s dictum** above quoted was discussed. The learned Chief Justice did not think that it was an accurate and universal proposition, though, like **Evans J.** he was constrained on the facts of the case before him, to hold that the injuries inflicted were undoubtedly the cause of death of the deceased, and he brought in a verdict of guilty of assault.

I am unable to subscribe to the view that a court of law is precluded from coming to a conclusion about the cause of death by reason only that no medical evidence was available, or if available, was not satisfactory or not "scientifically" conclusive. There are numerous cases of convictions for murder or Culpable Homicide where no body was found at all, much less medical evidence respecting it, so also where a body was so decomposed that the cause of death could not be ascertained. It all depends on the circumstances. In **Sibanda and Others v. the State** 1969 1 P.H. 122 quoted by my brother Mapetla C.J. The Appellate Division held per Wessels J.A. :

> 'The State was not required to

> demonstrate the cause of death with scientific exactness and as a medical fact beyond dispute.'

What the State need prove is that the death of the deceased was caused, beyond reasonable doubt, by the hand of the appellant. And reasonable doubt does not mean any shadow of doubt. **Denning J.** (as he then was), in **Miller v. Minister of Pensions** 1947 2 ALL E.R. p. 373, is reported to have said:

> 'It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted of fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it is possible but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice'".

Again in **Piet Letuma v. Rex** (Criminal Appeal 44/75 - unreported) the same Judge said:

> "I need hardly add that in many cases the evidence can be such that without a medical opinion at all, a magistrate may, on lay evidence, find what is the cause of death in general terms. It is ultimately the judicial opinion that matter; doctors' opinion are merely a guide. Where, for example, a witness X sees Y stab Z ten times and sees Z die immediately, the magistrate will have little difficulty in concluding not only that Y caused the death of Z, but also, if Z was well and healthy before, that the wounds inflicted by Y were the cause of death. How it occurred precisely may not be available, except by medical evidence, but its absence, in my judgment, does not preclude the magistrate from making a finding if it is warranted by other evidence. (see Lesotho High Court Criminal Appeal, **Thabiso Tsomela v. R.**) (supra). In **Sibanda & Others v. State** 1969 (1) P.H. H.122 the Appellate Division held, per Wessels, J.A.:
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> > 'The State was not required to demonstrate the cause of death with scientific exactness and as

> a medical fact beyond dispute. It must only prove beyond reasonable doubt that the deceased died as a result of an injury caused by the accused.'

Delvin, J. (as he then was), in his charge to the jury in **R. v. Bodkin Adams** 1957 Criminal Law Report page 365) told them:

> 'Cause means nothing phisological or technical or scientific. It means that you twelve men and women sitting as a jury in the Jury box would regard in common sense way as the cause of death'
> "

In the present case there is medical evidence which excludes the possibility of death from natural causes. The dead body of the deceased was examined by the doctor who found that all the organs, including internal ones, were normal. It follows that the only abnormal feature which caused the death of the deceased was the severe burns which covered 50% of the deceased body.

In **Rex v. Thabiso David Nthama** 1980 (2) L.L.R. 316 at p. 326 Cotran, C.J. said:

> "The Crown, through the evidence of the doctor who did the post-mortem examination adduced **prima facie** evidence of causation (hunt, supra, p. 342 (C) and thus the "evidential burden" has shifted to the accused. Indeed neither the obiter dicta of Young J in **R. v. Mabole** (1968 (4) S.A. 811 at 815) on which the learned Judge relied nor the facts of the case itself would

> indicate that a submission or an argument, or, provided there is acceptable medical evidence on the kind of injuries received and on the cause of death, that lack of evidence about treatment suffices to break the chain. It is only when the question of Novus actus is "properly introduced" (be it by the Crown, the accused or the general tenor of the evidence) that the **onus** would have to be discharged by the Crown."

In the present case the question of **novus actus interveniens** was never introduced by either the Crown or the defence. The latter's main concern was that the doctor has not stated the cause of death in his report. It seems to me that that fact should not be regarded as the end of the matter and that the accused cannot be found guilty of any form of homicide. There is evidence by the doctor which excludes any **novus actus interveniens**. The deceased was a healthy person just before he was burnt. He was actually working in the mines in the Republic of South Africa. After he was burnt he was taken to the hospital at night and the following morning it was reported that he was dead. He had no other injuries except those caused by the accused. There is no evidence of any treatment at the hospital. I come to the conclusion that there was no **novus actus** and that the deceased died as a result of the injuries caused by the accused.

For the reasons stated above I have formed the opinion that the accused had the intention to kill the deceased. "A person in law intends to kill if he deliberately does an act which he in fact appreciates might result in the death of another and he acts recklessly as to whether such death results or not", as per Williamson, J.A. in **S. v. Mini** 1993 (3) S.A. 188 (A.D.) at p.192.

The accused is accordingly found guilty of murder.

My Assessors agree.

J. L. Kheola,

(J. L. KHEOLA)
CHIEF JUSTICE.

11th November, 1994.

For Crown - Mr Ramafole
For Defence - Mr Teele.

EXTENUATING CIRCUMSTANCES

It is trite law that provocation short of what is required to negative guilt may constitute an extenuating circumstance (See South African Criminal Law and Procedure Vol. II, 2nd edition pages 381-382). It is common cause that the accused was treated in a very insulting and provocative manner by the deceased. However the provocation was short of what is required to negative her guilt but is does constitute an extenuating circumstance.

There was also the question of drunkenness which was well canvassed during the trial. The accused was drunk and it was her first time to take liquor. However the intoxication was not such that it would amount to a defence in terms of the Criminal Liability of Intoxicated Persons Proclamation No.60 of 1938.

I come to the conclusion that there were extenuating circumstances.

In passing sentence I took into account that this case has been hanging over her head for over five years and it was not through her fault that the case was not prosecuted earlier. She has suffered a lot.

The accused's youngest child is only six years old. It is a pity that a child of that age should be separated from its parents but the Court has no alternative. The accused has committed a very serious offence involving an element of cruelty.

SENTENCE

Seven (7) years' imprisonment.

J.L. KHEOLA
CHIEF JUSTICE

11th November, 1994

For Crown - Mr. Ramafole
For Defence - Mr. Teele.