

IN THE HIGH COURT OF LESOTHO

In the matter between.

R E X

and

MASAKOANE MALUKE
MOKHEHLE THEETSI
MAPHETHISO THEETSI

1st accused
2nd accused
3rd accused

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 28th day of February, 1994

The accused are charged with the murder of one Thabiso Besetsa on or about the 11th day of February, 1989 and at or near Linakaneng in the district of Mokhotlong

In the second count the accused are charged with housebreaking with intent to assault and assault, it is alleged that upon or about the 11th February, 1989 and at or near Linakaneng in the district of Mokhotlong, the said accused, one or each or all of them, did unlawfully with intent to assault, break and enter the house there situate of one Molefi Theetsi, and thereafter did unlawfully assault Molefi Theetsi and 'Matsepang Theetsi.

The accused pleaded not guilty to both charges.

This is a case involving people who are closely related to each other. Molefi Theetsi is the nephew of A1, A2 is the stepbrother of Molefi, A1 is the brother of A3.

The post-mortem examination report was handed in as an exhibit because the doctor who made it has left this country for good. According to it the cause of death was cerebral bleeding. At the time of examination the body was in an advanced state of decomposition. The face and the body were swollen and full of water blisters from bacteria, flies and insects in the mouth. There was a 4x8cm. open wound on the left skull.

P.W.1 Molefi Theetsi testified that one day in February, 1989 he and the deceased left their homes and went to the cattleposts. While they were there the deceased's sheep went missing. Some of the missing sheep had belts hanging from their necks. They looked for the sheep and found them below the cattlepost of A1. At the time they found them A1 was not at his cattlepost but A2 and one Teretere were there. P.W.1 says that before they went to A1's cattlepost they had information that A2 had taken the belts from the missing sheep.

When they arrived at the cattlepost they confronted A2 and

told him that they knew that he had taken the belts. He said he knew nothing about them. Despite his denial they searched in the cattlepost hut but found nothing. The search was conducted in the presence of A2. P.W. 1 says that they did not assault A2, nor did they threaten to assault him if he failed to produce the belts. After the search they drove the sheep back to the cattlepost of the deceased. It was on a Thursday. On the following day they returned to their village.

P.W. 1 says that on Saturday at about 3 00 p.m. he saw A2 arrive at his parents' home. He met his mother (A3) and they both went into the house. At sunset the deceased came to his (P.W. 1's) home. A3 came out of her house and called him. Deceased went to her. P.W. 1 was within a hearing distance. A3 asked the deceased why they invaded his son at the cattlepost and accused him of stealing the belts. She said that A2 had told her about the invasion. The deceased asked her the whereabouts of A2. She said that she had instructed him to go to Komakoma to fetch A1 so that he could come and kill them for what they did to A2 at the cattlepost.

P.W. 1 interjected and said that he was in the company of the deceased when they went to A1's cattlepost and that there was no invasion. A3 said that she did not want his comment because he was out to kill her children.

Thereafter the deceased joined P W 1 at his home at about 6.00p m. They decided to remain together awaiting the return of A2. He did not return until the deceased left for his home at about 8.00p m. Immediately after the deceased had left, A1 and A2 arrived. At that time P W 1 was in his house and was in the company of his wife. He was having a meal. A1 came near the door and called him (P.W 1). He asked him to come out of the house. P W.1 asked A1 what he wanted him for. A1 said he and P.W 1 knew each other and that there was no reason why he should refuse to come to him when he called him.

P W.1 refused to come out and took his stick and put it besides him. His wife put away the food. All, of a sudden one of the accused struck the door with a hammer and broke it. It fell into the house. P W 1's wife rushed to the door in an attempt to get out and raise alarm. She managed to get out and raised alarm. A1 got into the house. He was holding his blanket in one hand and a stick in another. As soon as A1 came in a struggle ensued between him and P W 1. During the struggle P W 1 threw A1 to the ground about two paces away. He rose, leaving his stick and blanket on the floor, he rushed at P W 1 again. This time he managed to press P W 1 against the wall and called A2 who had remained outside the house.

A2 came in and stood behind A1. He (A2) directed a stick

blow at P W.1 but the latter dived and evaded that blow The stick hit the wall P W.1 warded off the second blow with his left hand A2 delivered the third blow, P.W.1 succeeded in getting hold of the stick and tried to wrest it from him At the same time he pushed A1 and forced him to collide with A2, He got a chance to run away and crossed to the other side of the stream that passes near the village As it was dark the accused were unable to find him again

While he was sitting on the other side of the stream he saw that the accused were using a torch and searching for him around the house. He remained there for a long time When he eventually returned to the village he noticed that the three accused were in A3's house and many villagers were at the forecourt and trying to force upon the door. They intended to arrest the accused for the murder of the deceased in Count I. P.W 1 joined his co-villagers and guarded the house in which the accused were hiding until the following morning During the night siege the accused were asked why they killed the deceased They said that they had a right to do so and that they wanted to kill him (P W 1) as well

After the arrest the accused were taken to the home of the deceased. P.W.1 says that he saw the following injuries on the deceased: a wound on the left side of the head running from above

the jaw to the back of the head, it was an open wound which exposed the brain; a wound running from the forehead to the middle of the head; a swollen wound running from the right jaw upwards. He was covered with blood on his body and there were some contusions. The accused were asked what weapons they used to inflict such injuries. They said that they used their sticks which they were still holding at that time. The sticks were seized and kept at the chief's place.

P W.1 says that his right hand was swollen due to the warding off of the stick blow directed at him by A2. He did not consult a doctor about that injury because he had no money. The police were aware of that injury. They instructed him to see a doctor but he did not do so for the simple reason that he had no money.

In cross-examination it was put to the witness that his door got broken on the previous day i.e. on the 10th February, 1989 when he fought with another man. He denied this. He denied that when they arrived at the cattlepost they chased A2 and accused him of stealing two sheep and bells.

P W 2 'Matwo Besetsa testified that she is the wife of the deceased Thabiso Besetsa. A1 is her brother. A3 is her elder sister. On the night in question she was in her house with her

husband. They were about to go to bed when they heard a knock at the door. Before they answered the knock a person got into the house. That person was A1. His left arm was rolled up in blankets. He held a stick in his right hand and was raising it up in a manner indicating that he was ready to strike. He informed the deceased and his wife that they had come and invited him (deceased) to do what he had done at the cattlepost. The fight started when A1 hit the deceased with a stick on the forehead. The deceased pushed him away. A1 did not fall when he was pushed away. The deceased picked up a stick but it fell down before he used it because of the struggle between him and A1. A1 called A2 and asked him to come in so that they could kill a person.

A2 came in. He was holding a shiny weapon. They hit the deceased who had already fallen down. They kept on hitting him and then pulled him outside where the beating continued. P W 2 says that during the assault of her husband by A1 and A2 she was screaming but was unable to run away because the fighting was near the door. After the accused had pulled the deceased outside she came out and went to the homes of their neighbours and raised alarm. She returned to her house accompanied by her neighbours. As they approached the house she saw A1 and A2 going down towards the home of P W 1. The deceased was found at the forecourt and was carried into the house. He was unable to speak and was

groaning and breathing with difficulty. He had a big wound on the head which was bleeding profusely. A scarf was used in an attempt to stop the bleeding. There was a depressed wound on the forehead. Deceased died on the following morning.

P W 2 says that in the morning the accused were brought to her house. They were handcuffed. They were shown the body of the deceased by one Sera. They admitted that they had killed the deceased, She denied that they made the admission because they were being assaulted by the villagers.

In cross-examination P.W 2 denied that that after knocking at the door Al identified himself to deceased and informed him the purpose of his visit as being that he had come so that they could discuss what had happened at his (Al's) cattlepost. She insisted that Al did not say anything but pushed the door open after knocking. She denied that deceased opened the door and attacked Al with his stick. She says that it was Al who rushed at the deceased and the latter pushed the former but without much success because Al was already hitting him with his stick. She denied that the two wounds found on the head of the deceased were inflicted by one Makhala Ralichelete on the previous day.

P W 3 Detective Sergeant Ntsika testified that he arrived at the home of the deceased on the 12th February, 1989. He

examined the corpse of the deceased and found the following injuries: The head was covered with a lot of blood and bandaged with a doek. He removed the doek and saw an open wound on the horn of the head. There was a depressed wound on the forehead. Both hands and both forearms were swollen. The corpse was taken to Mokhotlong mortuary for examination.

On the same day P W 3 went to the home of P W 1. He was in the company of A1 and A2. He noticed that the door of the house of P W.1 was broken and that P.W.1's hand was swollen. He instructed P W.1 to go to the charge office so that he could make arrangement for him to see a doctor. P.W 1 never came to the charge office.

A1 testified that A2 was his herdboyc. One day A2 came home from the cattlepost and reported to him that P W 1 and the deceased had invaded him at the cattlepost. On their arrival they accused him of the theft of their bells. They threaten him that if he failed to produce the bells they would arrest him and call the members of the anti-stocktheft unit who would deal with him accordingly. They searched the cattlepost hut but found no bells. A1 says that after receiving this report he decided to go to the homes of P.W 1 and the deceased in order to confront them with A2. They arrived at the home of the deceased at dusk. They were both carrying their sticks.

When they arrived there he (A1) knocked at the door. The deceased asked who was there. A1 told him his name. The deceased invited him to come in and said that he already knew why he had come. As soon as he entered the deceased rushed at him. He (deceased) was holding a stick in his hand. A1 says that he had no alternative but to get hold of him. A1 asked him what he was doing. There was no answer. They grappled with each other until they got outside at the forecourt. They both fell down side by side. When he (A1) rose A2 hit him on the head with a stick. Before they both fell down he had heard the sound of a stick blow but he did not notice who was hit. After he was hit he asked A2 why he was assaulting him. He did not get any answer. A2 retreated. He advised A2 to leave the deceased and go away because he (deceased) was drunk and might assault them. He concluded that he was drunk because he had a smell of liquor. He (A1) took his stick from where it had fallen near the door during their struggling. He did not hit the deceased with his stick after he retrieved it. At the time they left for A3's place the deceased was trying to get up but was unable to do so.

As they proceeded towards the home of A3 they decided to call at the home of P W 1 who was a teetotaler from who they were likely to get an explanation. He knocked at the door and told P.W 1 his name. The latter said he should come in as he already knew why he had come. He (A1) caught the door. It fell

down He then saw P.W 1's wife come out She ran away. P W 1 rushed at him He was holding a stick Realising that he had no chance to run away because P W 1 was already too close to him, he caught hold of him and they grappled with each other When A2 came into the house he (A1) had already released him. He ran away and they never chased him. They went to A3's house where they were besieged by the villagers for the whole night At one stage during the siege A2 took the hammer and hurled it at the villagers The hammer had been inside A3's house and was never taken to P W 1's house and used to break his door

The story of A2 is that the deceased and P W.1 invaded him at the cattlepost of A1. They accused him of the theft of the bells When they came to his cattlepost they were already in a fighting mood They searched in the cattlepost hut but found nothing They conducted the search in his absence. After their departure he discovered that the sum of M80 which was given to him by A1 for the purpose of buying mealie meal, was missing. The invasion of his cattlepost took place on a Thursday On Saturday he decided to go and report to A1 He first called at his mother's place and reported to her She said she had no authority over him and the animals and instructed him to go and report to A1. It was after sunset when he made the report to A1 who suggested that they should go to those people

They went to the home of the deceased first. A2 says that when they arrived there he remained outside. A1 went near the door and the deceased said he should come in. He (A1) opened the door and went in. He (A2) sat down outside and did not hear what they were saying in the house. He suddenly heard there was a commotion and noise inside the house. P W 2 came out and raised an alarm saying that A1 was there and was killing her husband. A1 and the deceased came out fighting with their sticks. They were holding each other. When they came to the forecourt A1 asked him (A2) why he was standing there and not fighting. A2 says that he went to them and delivered one blow directing at them. The blow landed on one of them but he does not know who. His intention was to stop them from fighting. After delivering that blow he noticed that the deceased had already fallen down but he rose again and continued with the fight. Deceased fell down again and A1 said they should leave.

On their way they called at the home of P W 1. A1 called P W.1 and said he should come outside. P W.1 refused to come out. A1 went into the house. Immediately after he had entered he called him (A2) and said he should come in. He went in and saw that A1 and P W 1 were holding each other, they still had their sticks in their hands. P W 1's wife ran away as soon as A2 came in. A1 instructed A2 to hit P W 1 with his stick. A2 says that he got behind A1 but P.W 1 escaped and ran away before

he could hit him Thereafter they went to A3's place where they were later besieged by the villagers

In her evidence A3 denied that she sent A2 to go and call A1 so that he could come and kill P.W 1 and the deceased She never uttered words to that effect. All what she said was that she had no responsibility over the animals and she instructed A2 to make his report of an invasion to A1.

I have carefully considered the evidence of all the witnesses in this case and I have had no hesitation to reject the evidence of A1 and A2 as false beyond any reasonable doubt A1 says that during his fight with the deceased he never hit him with a stick They merely grappled with each other until they got outside where A2 separated them. A2 also says that he never hit the deceased He hit A1 on the head in order to force the combatants to separate, and infact they did separate after that blow. Now the question is who inflicted those serious injuries on the head of the deceased? The accused say that the deceased sustained those injuries on the previous day when he fought with another man

That, of course, is nonsense The injuries which the deceased sustained during the attach by A1 and A2 were so devastating and immediately overwhelmed him so that he was unable

to get up from where he had fallen. He had to be carried into the house and was unable to speak. The wounds were immediately bandaged with a doek. It does not make sense to say he had sustained such serious injuries on the previous day. That same afternoon he was returning from a communal work of cutting wild oats and had no injuries. He could not have gone to the fields with such injuries which when inflicted by A1 and A2 that night immediately incapacitated him. A1 and A2 were determined to tell this Court nothing but a pack of lies. The wife of the deceased was present in the house when the two accused came and viciously attacked her husband and inflicted all those injuries. I accept her evidence because she impressed me as being an honest witness. She was honest enough to say that both accused assaulted the deceased in the house but she did not see who inflicted which injury.

Both defence counsel submitted that she was an unreliable witness because in her evidence she referred to many injuries sustained by the deceased at the hands of A1 and A2. Her evidence on this aspect is in direct conflict with that of the doctor who performed the post-mortem examination. I do not agree with that submission because at the time the dead body was examined by the doctor it was in an advanced state of decomposition. It was so bloated that the doctor was unable to do a proper examination. He could no longer see such injuries.

as swollen arms and hands. He does not refer to the depressed wound on the forehead. I formed the opinion that it is the doctor's evidence that is unreliable because he could not do a proper examination under the prevailing circumstances. For instance, the majority of the internal organs were not checked by the doctor.

There are some contradictions in the evidence of A1 and A2. One of such contradictions is that A1 says that when he got into the house the deceased rushed at him. He (A1) caught hold of him and they grappled with each other until they got out of the house. He says that during their grappling they never used their sticks. In fact his stick had fallen down near the door during their struggle. On the other hand A2 says that when the deceased and A1 came out of the house he was at the forecourt and saw them fighting with their sticks. According to him they were not holding each other. When they came out A1 struck the deceased and as a result of that blow the deceased fell down.

The above contradiction in the evidence of A1 and A2 shows that they are not prepared to tell the Court the truth. A1 wants this Court to believe that, other than grappling with the deceased, he never hit him with a stick. When asked how the deceased sustained the injuries which incapacitated immediately after their fight, he gives the ridiculous explanation that he

sustained those injuries on the previous day That is an outright lie.

Another contradiction in their evidence is that A1 says that during their fight with the deceased he never invited A2 to come and help so that they could kill the deceased However, A2 says that A1 asked him why he was standing there He understood that to mean that he must help On this aspect of the case I accept the evidence of the wife of the deceased that the deceased was overpowered by both accused in the house when A1 directed a stick blow at him which landed on the head Deceased fell down He was pulled out of the house and belaboured by both accused at the forecourt. I accept her story that A2 came into the house when he was called by A1 and that the former used a shiny weapon (apparently a sword of some kind) The huge wound on the head of the deceased must have been caused with that kind of weapon

The wife of the deceased impressed me as an honest and reliable witness It must be borne in mind that she was giving evidence relating to events that took place at night about four and half years ago, that the events relate to a vicious murderous attack upon her husband Whatever discrepancies were pointed at her evidence I never had the impression that she was deliberately misleading the Court

The accused invaded the homes of the deceased and P W 1 at night. There was no urgency in the matter that they wanted to discuss with them. The so called invasion of A1's cattlepost took place on a Thursday. It was only on Saturday night that the accused found that the matter was so urgent that they could not wait until the following morning. In any case if the accused regarded the matter to be all that serious they ought to have sought the assistance of the chief. They did not even call at the home of A3 who invited them. I am of the view that when A1 and A2 went to the homes of P W 1 and the deceased their intention was to assault them and that is exactly what they did.

I have formed the opinion that A1 and A2 had the requisite intention for murder in that when they repeatedly hit the deceased with a stick and a shiny object they foresaw the possibility that their actions were likely to kill him but they were reckless as to whether death occurred or not.


Regarding Count 2 it is clear that P W 1 was lucky to escape before he was severely injured. It was submitted that his evidence must be rejected as far as his alleged injuries are concerned. He did not seek any medical treatment which could confirm that he had such injuries. I do not agree with that submission inasmuch as the injuries are not only described by P W 1 himself but Detective Sergeant Ntsika confirms that P W 1's

hand was swollen. It seems to me that there is enough evidence to convict the accused of the offence alleged against them

The evidence against A3 comes from P W.1 that when she instructed A2 to go and fetch A1 from his place, she said A1 should come and kill the deceased and P W 1 It was submitted that by uttering those words she clearly indicated that she had common purpose with A`1 and A2. She has denied that she ever uttered those words It seems to me that the evidence by the Crown is not strong enough to sustain a conviction against A3.

Judgment A1 and A2 are found guilty as charged on both counts
A3 is found not guilty on both counts and she is discharged

My assessors agree.


J.L. KHEOLA
JUDGE

28th February, 1994.

J. L. Kheola
G.L. KHEOLA
JUDGE

28th February, 1994.

For Crown: - Mr. Ramafole
For 1st Accused - Mr Ntlhoki
For 2nd Accused - Mr. Mathafeng.