CRI/T/20/91

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

V

LERATA MOKETE
RETŠELISITSOE MOKETE

JUDGMENT

Delivered on the 25th May, 1994 by the Honourable
Mr. Justice W.C.M. Maqutu, Acting Judge

In this case the accused are charged with the crime of murder:-

> In that upon or about the 17th day of November 1989, and at or near Ha Lesiamo in the district of Leribe the said accused did one or the other or both of them unlawfully and intentionally kill Leloko Molapo.

Accused number one pleaded not guilty to the crime of murder but guilty to culpable homicide.

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Accused number two pleaded not guilty to the crime of murder.

The Crown refused to accept Accused number one's plea. The position the Crown took in its outline of facts was that both accused had unlawfully assaulted the deceased. The Crown promised that it will bring evidence to prove murder against both accused.

The Preparatory Examination was held and concluded on or about the 24th August, 1990. The accused have been out on bail.

The facts of this case are not straight forward. Both Crown witnesses and Defence witnesses were not particularly forthcoming about the cause of this tragedy. I will therefore give in a nutshell the series of events that led to the death of the deceased.

I will start with what the Court observed at the ispection in loco because unless this is done nothing will fall into place.

The two accused, Lerata and Retšelisitsoe, are the sons of Mokete while the deceased, Leloko, is the son of Molapo. Mokete and Molapo were the lawful allottees of the right to till and use adjacent pieces of land commonly known as "masimo" in Sesotho, the indigenous language of Lesotho. These lands had been

in the Mokete and Molapo families for many years. Both the accused and the deceased used these lands during the life-time of their lawful allottees.

Trouble seemed to have started when deceased, Leloko Molapo, ploughed the adjacent portion of the land of the Mokete's land which had been tilled by accused's family for several years. Accused Number One brought a court action CC.No.117/88 in which they styled their claim wrongly. They claimed deceased had ploughed a grass strip instead of showing that what had been ploughed was a portion of their parents' land. Accused Number One was successful in the Local Court but the Central Court in CC.No.177/88 reversed the decision requiring him to put his claim in an intelligible way. After deceased's death Crown witnesses were not prepared to tell the truth about what deceased had done. Fortunately at the inspection ***in loco*** PW.3 (the deceased's wife) unequivocally stated that deceased ploughed this adjacent land although it had been tilled by the accused's family for several years. Deceased had claimed to be asserting an old right to that land because he alleged the boundary had been wrongly changed.

The fight that led to the death of the deceased occurred almost seventeen days after the Central Court had reversed the judgment in favour of the accused by ordering absolution from the instance. The first accused says this case was the cause of the fight. Could it be that the accused was angered by the fact that he had been ordered to institute legal proceedings afresh? The first accused does not say.

There are no grounds to disbelieve him, therefore it follows that the result of the case and the first accused's resentment over a portion of the parents' land which deceased had ploughed smouldered. Unfortunately this smouldering resentment which the accused bore towards deceased's action is far too remote to be relevant material to the merits of these proceedings. It only puts the tragic events that followed in perspective.

The deceased had been passing over the accused family land to go and till his family land for several years. There is in fact a small foot-path that passes at the edge of this land which seems to be used as a short cut to other lands. These many footpaths that go through people's lands are very common. During the inspection ***in loco*** we used some of them. Therefore the footpath on the accused' family land was nothing exceptional. On the fateful day deceased drove his scotch cart on accused' land to go and plant his parents' land that was already ploughed. An impression was given during evidence that deceased had used an access route that could be equated with a public road. It became clear and the dispute was resolved at the inspection *in loco* that deceased drove his scotch-cart to his parents' land over the land of accused' parents. He had been doing so over the years without incident.

At the inspection *in loco* it became clear that deceased could have gained access to his parents' land through other routes had he not regarded it as his right

to pass over the accused' parents land over the years. It is common cause that while the deceased was planting in his parents' land the accused ploughed the access route over their land in order to prevent deceased from passing over their parents' land as he usually did. At the inspection *in loco* whatever dispute there was about this practice of the deceased seems to have been resolved. What emerged was that the accused exercised the right to plough their parents' land at the most inconvenient time for the deceased. They so to speak terminated the courtesy of allowing deceased to pass over their land without prior warning to the deceased.

The deceased did not elect to look for alternate routes but sought the intervention of chiefs to pass through the accuseds' family land. The Chiefs were unable to help. I have already said if deceased had really made an effort to do so, he could have found an alternate route. The initial instructions of the accused to their Counsel do not disclose that they made their Counsel aware of the alternate route deceased could have used. It was only after a recess over a week-end that the accused were able to describe the alternate route that the deceased might have used. Therefore this route was not put to Crown witnesses. It seems clear therefore that the accused were determined at that point in time to embarrass and inconvenience the deceased.

The first attempt by the deceased to get out of his family land through the accused family land was done in the presence of PW.5 Sakoane and the late

Lioroane. PW.5 and Lioroane had been sent by the headman Motlatsi because he had received a message that there was trouble between deceased and the accused at their lands. In the presence of Lioroane and PW.5 deceased tried to go through accused's family land. Accused number one stopped him from passing as he had already ploughed the access route. PW5 and Liroane stopped deceased from carry out his intention to pass through accused's land.

Deceased then went to Chief Lesiamo Molapo PW.4 after borrowing a horse from his village headman Motlatsi. He came back claiming he had failed in his mission (according to what PW.3 and PW.6 said). It was then that he decided to force his way through the family land of the accused. Deceased was at this time armed with a sword. There is a lot of dispute about what really happened later after deceased had fallen to the ground. There is also a dispute about what accused number one was armed with. PW.3 and PW.6 say accused number one had a stick and a sword, while the two accused say he only had a stick.

Nevertheless it is initially common cause that accused number one stopped deceased cattle from going through his family land. Deceased got down from the horse he was riding and began to fight with accused number one with a sword. Deceased hit accused number one on the head with a sword and accused number one fell down. Deceased began to hit accused number one with a sword while Accused Number One was on the ground. Accused number two took a stone and hit

deceased with it. The evidence conflicts slightly on this point but deceased fell down. But both sides agree that accused number one began to hit deceased while he was on the ground.

PW.3 and PW.6 say accused number two also hit deceased while he was on the ground. Both accused deny accused number 2 participated in the assault. It is from this point that the evidence of the Crown and that of the accused becomes different and irreconcilable. Nevertheless the serious wounds on the head that caused the deceased's death are not denied. The accused are unable to satisfactorily explain how they came to be there. The bottom line of what they say is that they were caused by accused number one alone. Accused number two according to the accused one only hit deceased once with a stone in defence of accused number one who was being belaboured while he was on the ground. The Court's task is to resolve this dispute.

It will be observed that accused number one pleaded guilty to culpable homicide which plea the Crown rejected.

PW.3 Makopano Molapo (the wife of the deceased) is the first eye witness to give evidence. She said on this fateful day both accused were ploughing on the parents' land in the morning hours. Deceased and his children were planting his parents' land when she came with refreshments or food. The mother of both

accused told the accused to plough the access route which in PW.3's knowledge was a public path. Deceased sent Anna Sakoane to the Chief about this. The late Lioroane and PW.5 Sakoane came as the Chief's messengers. When they arrived the deceased drove his cattle to the closed access route, the two accused stopped them. PW.5 and Lioroane asked the accused why they stopped the cattle. The deceased then left apparently to go and report to the Chief personally as we shall later see. What is significant in the evidence of PW.3 is that deceased was not going home when his cattle were stopped, he was only going to change planters as the planter he was using had broken down. This first attempt to pass through the access route that had been ploughed over by the accused ended when Lioroane advised deceased not to pass there.

PW.5 Sakoane Sakoane says in his evidence Chief Motlatsi sent him and Lioroane to accuseds' land to see what was going on. When they got there deceased said his path had been blocked. He said this path was used by the public. Deceased spanned the cattle and attempted through the path that had been ploughed over. Accused number one stopped the cattle as they were about to enter the area and said the following words or words to that effect:

> "Leloko you will not pass where I have ploughed. You will not pass over my land, either you kill me or I kill you."

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PW.5 and Lioroane intervened and drove the cattle of deceased back to deceased's land. Accused number one thanked them for this. PW.5 advised deceased to go and report what had happened to Chief Motlatsi. Deceased went with PW.5 to Chief Motlatsi where he made a report. Chief Motlatsi provided deceased with a horse so that he could go and report what had happened to Chief Lesiamo Molapo PW.4. Under cross-examination PW.5 admitted that at the Preparatory Examination he never mentioned the fact that accused number one had said he would rather be killed or kill than allow deceased to pass over his ploughed land. Indeed PW.5 conceded he had not only been forgetful but was inclined to exaggerate.

PW.4 Chief Lesiamo Molapo confirmed that deceased came before him in the afternoon and reported that the two accused were blocking the path. He wrote a letter to Mokola Molai the headman of the accused. Relations between deceased and the accused were not good because of the land dispute. It was a dispute about a portion of the land belonging to the family of the accused. The matter was taken to the court. Under cross-examination PW.4 did not dispute that the path or access route deceased used was on the family land of the accused. He could not be absolutely certain because he lives some distance away. This was so despite the fact that he has a tree plantation next to the family land of the accused.

PW.6 Kopano (the son of deceased) confirms they have always gained access

to their land through that path. He regards it as a path for the public. They had got to their land through that path. Accused number one closed it because accused number one claimed it was on the land of his family. Two Messengers of the Chief came as a result of a message deceased sent to the Chief. PW.6 and deceased spanned animals and tried to pass where the path had been ploughed, accused number one stopped them from passing there. The Chief's Messengers tried to persuade accused number one to yield but accused number one resolutely refused to yield. Accused number two was not involved at this stage although he was around. The Chief's Messengers and deceased left together.

It is common cause that deceased came back on horse back later in the afternoon. PW.3 and PW.6 say deceased told them he had failed in his mission with Chief Lesiamo PW.4. He then spanned the cattle which pulled the scotch cart and went towards the ploughed access route. It is at this stage that events that followed led to the death of the deceased.

According to PW.3 accused number one said to the deceased, that deceased should get down from his horse so that they could fight. PW.6 says words to the same effect although differently phrased. PW.6 puts what accused number one said to deceased as follows:

"Leloko get down from your horse let us come and fight. This is

my family's land, you cannot pass here."

What PW.3 and PW.6 said does not coincide at places but they both say after deceased had begun assaulting accused number one who had fallen on the ground from a blow delivered by deceased with a sword, accused number two hit deceased with a stone and deceased fell. Accused number one got up and began assaulting deceased and accused number two picked up the sword that had fallen from deceased and joined accused number one (who had got up) in the assault of the deceased who was still on the ground. They deny that accused number two intervened to stop the fight at all. In fact they both add that accused number one and number two, after deceased had been left prostrate for some time, again assaulted him when they discovered deceased was still alive because deceased had called deceased's younger son, Morero, to come and collect his blanket and hat or helmet.

The two accused gave evidence. Both of them were not eloquent or impressive. Their demeanour and lack of communicative stills was a great draw back. It cannot be because accused number one is illiterate. In general the Basotho give evidence very clearly. Accused number two, who was literate, was even worse. In Hoffmann South African Law of Evidence 2nd Ed. at page 434 has correctly stressed:

"Whether a witness should be believed or not is obviously not a matter which can be decided by consulting authorities ... The value of observing the witness's demeanour .... should not be exaggerated. ... demeanour can be a very unsafe guide."

In the dispute over a portion of their family land with the deceased, accused number one in particular failed to properly articulate and even to frame his case in CC.117/88 before the Local Court and consequently the Central Court in its appellate jurisdiction in CC.177/89 directed that the case be heard afresh. Accused number one failed to tell me intelligibly the relevance of this case to the present tragedy. Had we not gone on an inspection ***in loco,*** the relevance of CC.117/88 which started at the Tsikoane Local Court and was reversed on appeal in CC.177/89 of the Tšifalimali Local Court would have been missed.

We are here concerned with the assault on the deceased which both parties agree that it caused his death as the admitted evidence showed. The lack of natural endowments of the accused and their dim wittedness was noted by the Assessors and I. Even though it affected their demeanour in Court, we have tried our best to see that all this does not affect our assessment of credibility. The evasiveness of the two accused and their reluctance to satisfactorily describe how deceased got his injuries left us in no doubt that the accused were avoiding telling the Court the truth. We have very little doubt that deceased was virtually uninjured during the

exchange of blows with accused number one before he fell. At the commencement of the fight the deceased had gained the upper hand quickly and felled accused number one with a blow. All the terrible and fatal injuries were inflicted on the deceased when he was on the ground after accused number two had hit him with a stone.

Accused number one was not prepared to state how long he had hit deceased on the ground. He sometimes said he did not count the number of blows he inflicted while deceased was on the ground at other times he alleged he hit deceased only twice on the head. Accused number two, who claims he was seventeen paces away when he emerged from the trees and took a stone with which he assaulted deceased , gave an unconvincing explanation of his failure to save deceased from injury at the hands of accused number one. According to accused number two, accused number one stood up and staggered before he proceeded to assault deceased with a stick. That being the case accused number two could have stopped the subsequent assault on the deceased if he had tried. Accused number two says he did not go near the fallen deceased because he was afraid deceased might get up and attack him. Accused number two was very evasive about the way he alleged accused number one assaulted deceased. He would not even try to estimate the number of blows that accused number one delivered and how this was done. Both accused number one and two refused to answer questions that could have shed light and helped the Court to determine how deceased suffered his injuries.

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In cross-examination it was not put to Crown witnesses that accused number one went back to the deceased to collect deceased's sword when deceased called Morero to come and take his hat and blanket. The impression was given that they never went near the deceased as the Crown witnesses alleged they did to finish off the deceased. To put everything in a nutshell I observed the two accused closely, their evasions, hesitations and reactions to awkward questions - S v Kelly 1980(3) SA 301 at 308BC. I remain with an unhesitating feeling that both accused have lied outright and at places told the truth selectively.

I have great difficulty with the evidence of PW.3 where she states accused number one had a sword and a stick when he invited deceased to a fight. This story is corroborated by her son PW.6. The difficulty I have is not so much what happened to the second sword but rather the fact that PW.6 quite innocently and truthfully admitted the influence of his mother on his evidence. He admitted they discussed the case, something that happens often in these cases but is never admitted. PW.3 and PW.6 have changed their evidence at places from what they said at the Preparatory Examination. PW.6 said what he said at the Preparatory Examination too was a result of discussion with his mother PW.3. The can of worms was opened when PW.6 would not admit that he saw accused number two hit deceased at the back of the head with a stone and his father fell. He had said this clearly at the Preparatory Examination. Before this Court PW.6 was no more prepared to specifically admit that accused number 2 had hit deceased at the back

of the head. It was at this point that PW.6 admitted the extensive influence of his mother on his evidence.

The problems which the Court had with PW.6 and the evidence of Crown generally on the assault as described by PW.3 and PW.6 became worse when PW.6 accused the police of stopping him from giving them the full facts. PW.6 in cross-examination gave the impression that the police stopped him from disclosing that there were two swords at the scene of crime one of them belonging to accused number one. PW.6 further said the police did not allow him to disclose to them the participation of accused number two in the assault of deceased. While the police may not be perfect, it is rather far-fetched to accuse them of defeating the ends of justice in this case. At the time PW.6 said this about the police he was seriously in trouble under cross-examination. A lot of what he was saying was illogical. He could not explain many things indeed he sometimes alleged accused number two used a stick not a sword.

I could not be certain that accused number one was untruthful when he said he did not assault deceased the second time, though he could not really have gone to pick accused's sword as he alleged he did. My doubt is, if indeed Mosiuoa had said the accused should go back and kill deceased as PW.3 and PW.6 say they did, the injuries would have been much more especially when a heavy stick and heavy swords were used. I had an opportunity to hold and wield the sword and the stick

before Court.

It is not really vital to the determination of this case to decide who the real aggressor was. The accused in closing the usual access route without warning were out to harass deceased. This was highly provocative especially because the accused could see that deceased regarded this route which passes over the family land of the accused logically or illogically as his right. The accused were out to cut deceased to size. That in itself does not show a clear intention to kill, much as it was intended to make deceased's life difficult.

I have already shown there was an alternate way out which deceased did not think of. If deceased had really tried, he could have found that route. It seems deceased was not prepared to bow down to the will of the accused. He sought the help of chiefs without success. There is a small footpath like many others which pass on the family land of the accused. Such footpaths are common on other lands as well. A scotch cart would require a small road rather than a foot-path. I therefore cannot accept that the deceased could claim a right of way over the land in question. Nevertheless the accused sought a confrontation with deceased and they got it.

Although accused number one might not verbally have invited deceased to a fight, through his acts he certainly was. Also by suddenly enforcing their rights

he was pushing deceased to do something if deceased so chose. Deceased fell into temptation of resisting the accuseds' act by force. He should have backed off as PW.5 advised him and actually persuaded him to do on the first occasion. In settled societies, individuals are discouraged and even forbidden from relying on force to settle their misunderstanding. Rights are not expected to be enforced by physical force. Neither the first accused and deceased are free from blame in what later ensued.

Perhaps accused number two (who was some distance away) might be said to have been defending his brother who was being belaboured on the ground by the deceased when he hit deceased with a stone at the back of the head. This conclusion is possible although I am well aware that the action of the second accused can never be judged on the same footing as when the attack was directed towards him. The reason being as Schreiner JA observed being:

> "in many cases the intervening third party will be better able to ward off the danger without causing death to the assailant than if he were himself being assaulted. For he is in no danger of having his protective action hindered by the assailant."

See R v Mhlongo 1960(4) Sa 574 at page 580.

In this case accused number two could not in the circumstances have been sure that if he delayed in taking remedial or protective action deceased might finish off his

brother whom deceased was belabouring on the ground.

The problem that the Court has to grapple with is that the deceased fell. First accused stood up, staggered a little when he stood up and thereafter belaboured the deceased who was on the ground. According to the doctor the injuries that were inflicted were so severe that immediate medical help might not have saved the deceased. Deceased, according to PW.3 and first accused, was lying on the back. Accused number one delivered frontal blows on the deceased's head causing (according to the medical evidence) the deceased to have "a depressed fracture frontal region with compression of frontal brain". That being the case deceased was not killed by the wound at the occipital region which was caused by the stone thrown by accused number two.

There is no doubt in my mind that the deceased was killed by the assault that accused number one admits having inflicted on the deceased. I reject the subtle suggestion in accused number one's evidence that it was possible to cause such an injury while deceased was standing and fighting. The description of the fight, as given by PW.3 and PW.6, shows clearly that the deceased was uninjured before he was hit by accused number two, causing him to fall. Thereafter accused number one proceeded to belabour deceased on the ground.

Reluctantly I give accused number two the benefit of the doubt in respect of

assaulting deceased while he was on the ground. He certainly did not expeditiously stop the fight between deceased and accused number one as accused number two would have us believe. He certainly was not afraid to approach the fallen deceased. There is a very great possibility that he also assaulted deceased. Unfortunately because of the nature of the Crown evidence, as given by PW.3 and PW.6, I feel I have to give him the benefit of the doubt. The type of injuries and their nature do not support the assault as described by Crown witnesses. If they were telling the truth the injuries on deceased's body would be far worse.

In my view, the Crown has failed to prove that the first accused had the subjective intention to kill, or that he formed it during the fight. It seems to me that there is no material on which the first accused can be said to have intended to kill deceased when he closed deceased's normal access route. He was harassing deceased and reducing deceased to despair but that does not mean he intended to kill deceased. Accused number one was determined to stop deceased by threat of force and actual force from passing through the land of the family of accused number one. Deceased initiated the actual physical attack on accused number one. After accused number one got up from the ground, after he had been hit with a sword, he must have been so angry and out of control that he inflicted the fatal wounds on the deceased when deceased suddenly fell. I therefore come to the conclusion that accused was so provoked that, in the circumstances, a reasonable man would have lost his self-control. R v Tenganyika 1958 (3) SA 7 at page 11.

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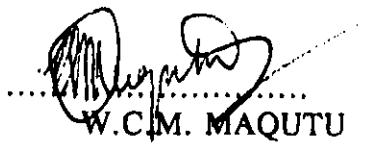
According to our Common Law for me to determine whether accused had formed the subjective intention to kill in a case such as this one should mentally try and project himself into the position of the accused at the time and guard against the subconscious influence of *es post facto* knowledge. See S v Mini 1963(3) SA 188 at 196. For subjective intention to kill to have been proved this must be the only possible inference that can be drawn. See S v Sigwahla 1967(4) SA 566 at 577. The Crown has not proved that accused number one had the subjective intention to kill deceased. All the crown has done is to prove that such a possibility exists. That is not enough.

I have found it unnecessary to go beyond the common law into the Criminal Law (Homicide) Proclamation of 1959 and its extension of the scope of provocation in reducing intentional killing to culpable homicide in line with English Law.

In the light of the aforegoing, I find the first accused guilty of culpable homicide. The second accused is given the benefit of the doubt and is consequently found not guilty and is discharged.

My Assessors agree.

Delivered at Maseru This ..... Day of May, 1994.



W.C.M. MAQUTU
ACTING JUDGE