

CRI\T\8\94

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

vs

1. HAREBATHO 'MOTA
2. NTSANE 'MOTA

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 5th day of October 1995

The deceased TEBOHO MOLISE who died on or about the 1st February 1993 at Masoeling Ha Patso in the district of Berea, was a fellow villager with these two accused persons. The deceased was a mine worker in the Republic of South Africa and had arrived on the day of his death, on a weekend leave. The accused are brothers. The accused are charged with intentional killing and murder of the deceased on the mentioned date.

A Preparatory Examination (the P.E.) had been held in which eight witnesses had been led, when later the matter was committed to the

High Court on the said charge. There was no evidence of a previous quarrel or animosity between the deceased and the accused who continued to refer to the deceased in the most respectful terms. The deceased had been much older than the two accused persons. Accused one (A1) is the younger brother of Accused two (A2).

The deceased died having sustained the following injuries, which were observed after examinations of the deceased by TISETSO CHERE P.W.1 and a medical doctor in an autopsy: (i) a stab wound on the right side of the cheek. (ii) a wound on the upper part of the arm; (iii) a stab wound on the lower part of the left arm. (iv) the stab wound on the chest region, two wounds towards the right side. (v) a stab wound on the stomach towards the right side. (vi) four wounds on the back, towards and between the shoulders. The medical report reveals external appearance as "multiple laceration on the body. Penetrating wound (R) lower chest continuous with liver laceration. Enteriorized omentum through (R) lower chest laceration." And that "about 250 ml of blood drained from peritoneum." The deceased's body had many wounds. The questions to be answered are therefore who killed the deceased and whether the killer had the right state of mind (*mens rea*) requisite for verdict of the crime of murder.

The Crown led the evidence of seven witnesses namely: Tiisetso Chere (P.W.1) who was P.W.2 at the P. E. Manapo Nku (P.W.2) who was P.W.6 at the P.E., Tjama Makhooane (P.W.3) who was P.W.4 at the P.E.

Malerato Molise (PW 4) who was deceased's wife, who was PW3 at the P.E. Patso 'Mota (P.W.5) who was P.W.8 at the P.E. who is the local chief, Trooper Monyane (P.W.6) of the R.L.M.P. who was P.W.1 at the P.E. and who was the investigating officer. The evidence of Paseka Molise (P.W.7) who was P.W.7 at the P.E. was read into the machine, by Counsel in terms of the Criminal Procedure and Evidence Act 1981. The whole evidence was led in order to prove that the accused were guilty as charged beyond reasonable doubt as against on a balance of probabilities. It has been said that:

" proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt 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 its possible but not in the least probable the case is proved beyond reasonable doubt, but nothing short of that will suffice." (See MILLER vs MINISTER OF PENSIONS (1947) 2 ALL ER 372 AT 373 per Denning J.)

P.W. 4 testified that on the 1st February 1992 she and the deceased were about to retire to bed when from inside the house they detected a movement or disturbance outside of something like a human being. The deceased therefore went outside to ascertain the source of the disturbance. Apparently nothing became of his endeavour as he

found nothing amiss and went back into the house. Hardly not more than ten minutes after he had been outside to check the source of the disturbance did he and P.W.4 detect yet some disturbance from outside. The deceased who had his horse tethered in the yard became suspicious and apprehensive of the situation and decided once again to go outside. This time he armed himself with a sword (Exhibit 4) and with him he also had a powerful torch (Exhibit 6) since the night was not a moonlit one. It was not a very dark night. Exhibit 6 is what is usually called a miner's torch. The deceased with the aid of his torch searched the surrounding of his homestead and of the surrounding area by the light of his torch. P.W.4 said she was outside not far from the deceased. In the process the light of the torch landed on a passerby who happened to be P.W.1 an elderly man of about 68 years and quite well known to the deceased. It was at the gate of the deceased's yard.

P.W.1 said that he was on his way to watch over one Monaheng's vehicle against theft or damage over the night. He confirmed that the deceased's torch shone on him. That thereafter he complained why the deceased was flashing about the torch. He came to appreciate the reasons why the deceased went about the exercise after the deceased's explanation. After the usual greetings P.W.1 and the deceased engaged in a conversation the gist of which centered around P.W.1's intention to sell his cow and the power of each other's torches. P.W.1 was also armed with a battle axe (Exhibit 3). This (the power of his torch)

the deceased wanted to demonstrate and flashed his torch in the direction of a local restaurant of one Mosoeunyane also known as Basia restaurant.

It was upon this flashing of the torch that a figure was lighted at about seventy to eighty paces from the place where the deceased and P.W.1 were; to the Basia restaurant. The deceased, P.W.1 and P.W.4 heard someone hurl an insult protesting against being flashed with a torch. Though the versions differ slightly as to the exact words uttered by the insulter but the substance of the swear words was that "who is it that is shining me with a torch, his mother's vagina" or some version of those words. P.W.1 says the deceased's name TEBOHO was actually used in the insult and it was not in a form of a question inquiring who was flashing the torch. The deceased did not take kindly to the insult (by speaking out as to who was swearing) and insisted (against the advise of P.W.1) on ascertaining the identity of the person who issued out the swear words. Deceased is alleged to have inquired loudly on three occasions.

It appeared that the person who had protested against being flashed with a torch was advancing towards both P.W.1 and deceased until at a point where the deceased recognized that it was the A1 who had just insulted him. That the deceased should have been most probably aware of who it was who was insulting him should be shown by his remark that: "It is this malnourished child (sekhohloana)". At

this point in time the accused was already advancing hurriedly towards the deceased wielding his knife (according to P.W.1's testimony). This is denied by A1. A2 could not have been around the scene at this time. He arrived later. A1 has his own version of events at this time. The deceased at the point in time had already come out of his yard. I believed that not only had he come out of his yard, he had advanced a few paces in the direction of Basia restaurant (where A1 came from). P.W.4 said he was able to identify A1 who had light clothes on and was wielding a shiny object. She was still on her forecourt.

P.W.1 says that the person wielding a knife approached and stabbed at the deceased apparently on the upper arms. P.W.1 had spoken to A1 by his name asking him what he was doing. It is then that deceased aimed at the A1 with his sword. This must have caused one injury on the A1's face. Both the deceased and A1 were outside. According to P.W.1 it was only after A1's stabbing action that deceased got out of the yard. I do not believe P.W.1 on this aspect. The likelihood is more that at that time the deceased had been a number of paces away from his gate in the direction of Basia restaurant. P.W.4 raised an alarm that "there was someone stabbing Aubuti Teboho:" (her husband, the deceased). The stabbing action seemed to have continued. P.W.1 said he also raised an alarm. P.W.1 says he was able to temporarily separate the two people by his intervention by holding A1. P.W.1 also sustained small wound on the

elbow from A1 in the process of forcefully separating them. It was after the deceased had already delivered a blow at A1 which landed on his forehead. A1 had also backed off for a distance of about 40 paces. I thought that the distance was considerable. This I say because P.W.4 gave the impression that P.W.1 did not succeed in separating the two fighters.

P.W.1 and P.W.4's evidence is consistent that after the above respite which could not have been very long, someone came hurriedly from the direction of Basia restaurant. P.W.4 said she thought this person was one of the person who came in response to the alarm. The version of P.W.1 is that A1 appeared to retreat to that distance of about 40 paces only after the man appeared on the scene. To his greatest dismay or arrival at the scene, the person was heard remarking whether A1 did not know where to stab a person in order to kill. He was then about 15 paces. It turned out that the intruder was A1's brother Ntsane (A2). It was in response to A2's presence that A1 sought to advance towards the deceased when then P.W.1 attempted forcefully to prevent A1 advancing towards the deceased in an apparent attitude of resuming the fight. P.W.1 says that he also sustained a small wound near the elbow having also fallen to his knees by dint of A1's push towards where the deceased was. P.W.1 had put on two blankets that made him slow and awkward in getting up.

When P.W.1 got up there he saw deceased inside the furrow along

the roadside. Then he saw A1 proceeding to the spot where A2 had already converged on the deceased and was vigorously stabbing at the deceased. A1 joined in the stabbing. P.W.1 pleaded with the two "to stop killing the son of Mosiuoa." The son of Mosiuoa was the deceased. It was at the time that one MORATEHI appeared that the stabbing stopped. P.W.1 says although he had his battle axe with him he did not use it in anyway. The deceased rose up and staggered to the other side of the road near the house of one PASCALIS SEATE where he fell.

The two accused stood where they had stopped after ceasing to stab the deceased. A1 is said to have remarked immediately after the assault: My brother Teboho, what is the problem?: ("Aubuti Teboho, Molato ke'ng"?) Moratehi is reported to have said "you think this man will ever reply?" This was in an apparent reference to the bad condition in which the deceased then was. P.W.1 says the two accused appeared to be drunk. They are well known to him. P.W.1 was himself proceeding to where the deceased was after having picked up his torch to get a clear view of the supine figure of the deceased. P.W.1 also thereupon called out to deceased's wife to raise an alarm that deceased was seriously injured.

After this vigorous assault upon the deceased, A2 was seen picking up exhibits 3, 4, 5 and 6 from the ground, which were reported to have been taken to the chief. It was only after their arrest that

accused produced an okapi knife and lebetlela (timber) stick, exhibit 1 and Exhibit 2 respectively. Villagers including deceased's people came. This was after P.W.1 had attended on the deceased who he made to sit up. P.W.1 says he was becoming aware that the deceased's life was expiring. Later on Paseka Molise came with his vehicle to carry the deceased's body to the police station, to the hospital and finally to the mortuary the deceased had already died. The deceased had about eight wounds according to the testimony of the P.W.1. These included a wound on the head, shoulder and kidney area. The deceased did not drink liquor during his lifetime.

Accused 1 testified under oath. He said that on this fateful day he had been with his girlfriend who worked at Basia Restaurant. He had waited for the girl to knock off from duty at the restaurant. He had not drunk any liquor. They had been with his brother A2 at the restaurant. A1 later left with his girlfriend. On the way he noticed two individuals with lit torches who were about seventy to eighty paces from restaurant. As he approached one of the torch bearers flashed his torch onto his face. A1 says he nevertheless kept on advancing towards where the torch lights came from. When he and his girlfriend were about fifteen paces away from the torch bearers he asked who were the persons who were flashing the torches at him. He said in response he heard a low toned voice from one of the torch bearers saying: "Who is this malnourished child who says I am flashing a torch at him " He says he did not respond. I do not

believe Al that he only wanted to find out who the person flashing the torch is. He must have gone further to issue out a swear word as the evidence of the Crown witnesses came out to say. Otherwise there is no good reason why suddenly the deceased replied in the way he did in reference to a "malnourished child." The flashing out of a powerful torch by the deceased, unintentional as it was must have resulted in great annoyance to Al. One of the mysteries that occurred was that this Court was not told as to how the Al's girlfriend disappeared or ended up in the circumstances described by the accused. Al later married the girlfriend. She was not called to give evidence.

Al went on to say that he proceeded on and approached the people bearing torches. When he was at their side and about to pass them something hit him at the back on the right shoulder. That he swiftly turned to get hold of his assailant who he later identified as P.W.1. He demanded to hear from P.W.1 why he was hitting him but P.W.1 offered no reply. No sooner had he been grappling with P.W.1 that he saw the deceased approaching from behind. He thereupon let go of P.W.1 and went for the approaching deceased who delivered a blow at him which landed on the forehead. This cannot be believed. As soon as he approached the two people Al had been seen wielding a knife. He was seen approaching hurriedly. It is true that he was hit with a sword by the deceased. It cannot be explained why P.W.1 having started the fight (as alleged) then thereafter stood aside when the deceased was attacked. It does not make sense. But in the context

of the flashing of the torch on the A1 for which A1 took offence together with the exchange of words with the deceased it could perhaps have been the deceased who started the fight but certainly not the P.W.1. I have already made a finding that the correct version of the events can only be that of P.W.1 who I found to be a reliable witness.

The evidence of A1 continued to state that no sooner had he grappled with P.W.1 that he saw the deceased approaching. That thereupon he let go of the P.W.1 and went for the approaching deceased who delivered a blow at him which landed on the forehead. While the fact of the assault by the deceased on the A1 was conceded, the way things happened can only be but somewhat different from that stated by the A1. P.W.1 was never involved in the fight at all. It can at most be that the deceased and A1 came face to face the deceased considering that the deceased must have made an approach towards the direction in which A1 came. I do not believe that deceased attempted to make these alleged blows with his weapon. Neither can it be that there was a struggle involving A1 holding on to the blanket of the deceased nor alleged struggle for the deceased's weapon. The story I believe is that from the onset the deceased was attacked with a knife, he attempted to defend himself with his sword, but was overpowered by A1's stabbing with a knife. Bearing in mind the credible evidence of P.W.1 I do not consider it reasonable to accept that A1 suddenly remembered that he had a knife in his possession after falling into a furrow on the weapon deceased was carrying. And

neither do I believe that with the aid of his teeth he managed to unclasp the knife (which he demonstrated).

The way in which their struggle with the deceased was described by the A1 and the unclasp of the knife does not explain and would not accord with the fact that the deceased ended up having three wounds on the chest. Alternatively even if A1 would own up either to those wounds on the chest and none at the back or vice-versa it is a mystery how the deceased ended up having about eight wounds at the back and front. The only inference would be that this accused is not telling the truth as to the number of the wounds he inflicted or how he inflicted them. The number of wounds would explain nothing other than the participation of A2 which I ended up believing as will shortly be narrated in the judgment.

It is correct, as A1 says, that the deceased ended up rising and going to the other side of the road but this was after the arrival on the scene of the A2 and his participation in the assault as I have believed the evidence of P.W.1. Indeed A1 it is common cause exclaimed or remarked as to what was wrong. As at the time of his remark it was not made clear whether it was before his brother (A2) made a remark or exhortation as to how best to stab a person. That remark could be nothing better than an attitude of belligerence on the part of A2.

I did not find any reason to believe A1 when he denied having sworn at the people who had flashed a torch at him. This shining of the torch at him could have greatly annoyed him. In the end I would not attach anything to A1's statement that he never came near deceased's gate. In my view while I believe that the fight did not take place at the deceased's gate it was not very far from that gate. I do not think that either before the fight or after the fight the deceased had always been positioned near the gate. He certainly must have approached further away from the gate towards Basia Restaurant. A1's denial that he stabbed P.W.1 with a knife on the left hand cannot be believed. To repeat this was in the process of P.W.1 intervening in the assault on the deceased in order to stop the act. A1 may not have seen the deceased's wife around the area or the scene. That may be so with regard to Moratehi who was not called in evidence. I believe that P.W.1 rebuked A1 and A2 for the killing of the deceased. At the time he called the deceased the son of Mosiuoa. Mosiuoa is the father of the deceased.

A2 says that on the fateful day he was also at Basia Restaurant where he was left drinking by A1 at about 8.00 p.m. A1 had asked A2 to elect to accompany him or wait while he (A1) took his girlfriend halfway. No sooner had A1 left that he heard a noise from the direction which A1 had taken. He had remained at the restaurant to finish up his drink when he heard the noise which apparently was that of human beings. He said he decided to proceed in the direction of

the noise and stood a distance away when he saw two people who at that time were doing nothing. One was on the road and the other was at the edge of the road. He demanded to know from these people what the noise was all about. A1 then answered to inform him that he was being assaulted by people who had waylaid him. He could not identify the other people at that stage.

A1 reported that he was being assaulted by PW1 and the deceased. He approached the spot where he found P.W.1 present. He then asked PW1 what the matter was but received no response. He noticed that P.W.1 was armed with a battle axe and had a torch in his possession. He disarmed P.W.1 who offered some resistance but ultimately succumbed. He had noticed any person other than P.W.1 and A1. Before he went away he noticed that there was someone seated on the ground. He inquired about the identity of that person but did not go near that person whose identity he did not know until he left the scene. Before leaving he saw a weapon on the ground which was a sword made of hard clay.

A2 testified further that during that night they were attacked by the deceased's relatives. The following day the police came and they took him together with A1 only as a means of rescuing him from the deceased's next of kin who wanted to avenge the death of the deceased. He denies ever fighting the deceased with his brother A1. He further denied even saying "man you don't know where to stab a

person to kill." He denies having ever taken part in the stabbing.

The intention of both accused was to seek to convince this Court that A2 was not involved in the fight at all. A2 even denies having seen the fight. This was the trend of A2's evidence-in-chief. He failed dismally to convince the Court of his absence of his involvement in the fight. Neither was he able to succeed in wanting to persuade the Court that when he left the scene he did not know who that person who they left seated at the edge of the road was. A2 was proved to be an inveterate liar. He could not avoid having to admit (when this was put to him) that under oath in his application for bail in CRI/APN/262/92 he made the following statements. That he had been with his brother drinking liquor at the Restaurant. A1 having left to accompany the lady and having heard some noise "he went there thinking that his younger brother was in trouble and found people fighting whom he could not recognize." There was a person with a torch who later lit people who were fighting. He saw his brother with blood all over his face fighting with the deceased. When he approached A1 and deceased, deceased moved a few paces and fell down and never got up again. Finally in the bail application A2 denies having assaulted the deceased in anyway. I have underlined those statements which A2 made in the bail application which he denied having made in this Court.

It is difficult to understand why A2 denies having in the least

see the fight and having identified the deceased as one of the people involved in the fight and that the deceased succumbed clearly as a result of their fight with A1. If ever there is anything that A2 has been consistent in, it is his denial that he was not involved in the fight. I did not believe him. It is clear that even after the first fight, that is before A2 came the deceased ended up being seriously injured. It may not have been fatal as at that stage. He may not at that stage have been like a gored bull frothing through the nostrils.

With regard to the first fight (the one involving only A1) circumstances may have ended up towards a conclusion that A1's action was excusable. That is, that he may not have intended to kill the deceased. In this event the Court would have come to a conclusion that had the killing resulted it would have been caused by negligence. This I say because I would still have been reluctant to accept that the deceased was the original aggressor nor that A1 acted in self defence. Henceforth in no way would I have found that the Accused would have been

"entitled to an acquittal on the ground that he was acting in self-defence unless it appeared as a reasonable possibility on evidence that the accused had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury, the

manner of self-defence which he used were not excessive in relation to the danger and the means he used were the only or least dangerous means whereby he could have avoided the danger." See R v Attwood 1946 AD 331 at page 340.

I have no doubt that as after the original fight A2 pounced on the deceased who was at a stage, in which he could not fight back. A2 was joined by A1. They both dealt the deceased with blows with their knives which resulted in his finally succumbing to actual death after having staggered to cross the road where he was left to die. There is no need to prove the causal connection between the act of each participant in causing the death of the deceased. One's act would be imputed to the other by law because they acted in concert, in common purpose. (see S vs Sefatsa & Others 1988(1) SA 868(A).

The Crown has proved beyond a reasonable doubt that these Accused assaulted deceased, they intended to kill the deceased in that they foresaw that death would result from their actions and they were reckless whether death ensued or not. See S v Mpala 1987(1) 556 (ZS) This was also borne out by the number of wounds found on the body of the deceased. The Accused are found guilty of murder. My Assessors agree.



T. MONAPATHI
JUDGE

5 October, 1995

For the Accused : Mr. Nathane

For the Crown : Mr. Thetsane